United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

76-5039

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -x

In the Matter of :

REA HOLDING CORPORATION, : Docket No. 76-5039
THE EXPRESS COMPANY, INC.,
REA EXPRESS, INC., f/k/a :
Railway Express Agency, Inc.,
REXCO SUPPLY CORPORATION, :

Bankrupts. :

- -x

MATTHEW E. MANNING, ANTHONY SATRIANO, :
DANIEL S. GILHULY, VINCENT PONTILLO,
WILLIAM R. WEGL. EDMUND F. NOVITSKI, :
EDWARD J. COX, ANTHONY J. JANUZZI,
CHARLES F. McGOVERN and JAMES J. :
KILCOYNE, petitioning creditors,

Appellants, :

v. :

C. ORVIS SOWERWINE, Trustee
in Bankruptcy, :

Appellee. :

- -x

FILED
JAN 7 1977

APPELLANTS' APPENDIX

Arthur M. Wisehart
WISEHART, FRIOU & KOCH
150 East 42nd Street
Fourth Floor
New York, New York 10017
(212) 557-8800

PAGINATION AS IN ORIGINAL COPY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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in Bankruptcy, :

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

NOV 11 1975

In the Matter
of

REXCO SUPPLY CORP.

Debtor.

No. 74 B 254

U.S. Courthouse
Foley Square
New York, New York

April 8, 1975

Adj XI-4, First Meeting

B E F O RE:

HON. JOHN J. GALGAY,

Bankruptcy Judge

RAYVID REPORTING SERVICE
CERTIFIED STENOTYPE REPORTERS
150 NASSAU STREET
NEW YORK, N. Y. 10038
CORTLANDT 7-3877
3878

administrative and procedural purposes, I would ask that we have one creditors committee in a single REA Express action on the papers, to save everybody's time and effort.

MR. ITZLER: We have no objection.

THE JUDGE: There being no objection, I will allow your oral application for procedural consolidation.

I will now receive nominations for a committee.

MR. ZIRINSKY: Before the election of a committee, is the court going to take up the question of indemnity at this hearing, before the election or after the election?

THE JUDGE: No, I think I will pick it up after the election.

MR. KAHN: We represent the Burlington Northern Railroad, I would like to nominate the following list of creditors to be the official creditors committee.

Mr. W.G. Workman, representing American Airlines; Mr. J.F. Murphy, representing Trans World Airlines; Mr. Robert

assistant treasurer to Super Tire Engineering Co., voting for Mr. Kahn's slate for $120,884.41.

MR. JONES: William P. Jones. I have a power of attorney from the Penn Central Trustee's to vote their claim in the amount of $509,438.75, in favor of Mr. Kahn's slate of candidates.

THE JUDGE: Are those claims on file or are you adding them now?

MR. JONES: I request permission to hand them up now.

THE JUDGE: All right.

MR. HAHN: Ray Hahn, R.O.Hahn, Inc., Cinncinatti.

I have a claim on file for $59,667.63. I vote that for Mr. Itzler's slate.

MR. ITZLER: You mean the Itzler slate?

MR. HAHN: Yes.

THE JUDGE: The claim of Hahn is withdrawn for the Itzler slate.

MR. ADAM: I am an attorney for United Airlines. I have with me for filing right now

THE JUDGE: I understand.

What claim do you vote?

MR. KAHN: I vote the claim of Burlington Northern Railway.

THEJUDGE: Mr. Sowerwine is elected as stand-by trustee. Just for the benefit of those who are not familiar with bankruptcy practices, again, the stand-by trustee has no function unless and until the Chapter XI proceedings failed and REA were adjudicated.

He would then be the trustee to administrate the liquidation of REA.

MR. MARCUS: Before we pass on from this, I want the record to indicate that the reasons why no further objections were made to union claims was because it was obvious that same was not required.

However, I don't want the court to regard this as a precedent. We were prepared to object.

I believe at this point I should state for the record that we are prepared again, as we stated before, to have the unions

UNITED STATES DISTRICT COURT
SOUTHERN DIST CT OF NEW YORK

In re

REA EXPRESS, INC.,
f/k/a Railway Express Agency Inc.,

Debtor.

FILED
NOV 7 1975
JOHN J. GALGAY
Bankruptcy Judge

75 B 253

Order of Adjudication in Bankruptcy

The above named debtor, REA Express, Inc., having filed a petition pursuant to section 322 of the Bankruptcy Act on February 18, 1975, and a hearing having been held before this Court on November 5, 1975, upon notice to the debtor, the debtor in possession and the Official Creditors' Committee, which hearing was held at a regularly scheduled adjourned First Meeting of Creditors of the debtor and adjourned hearing pursuant to section 326 of the Bankruptcy Act and Bankruptcy Rule XI-4 of the Rules of this Court, and this Court having made an order on November 5, 1975 requiring REA Express, Inc., REA Holding Corporation, The Express Company, Inc. and Rexco Supply Corporation to file an indemnity bond or bonds, or undertaking, with proper sureties in the total amount of $1.3 million at or before 4:00 p.m. on November 6, 1975 to protect the estates of said debtors against subsequent loss or diminution until the entry of orders of adjudication, if any, and the said debtors having failed to comply with said order, and C. Orvis Sowerwine having been duly elected stand-by trustee in bankruptcy at the First Meeting of Creditors held before me on April 8, 1975, and upon due notice to the debtor, the debtor in possession, the Official Creditors' Committee, and such other persons as is required and necessary, and there being no appear-

ance in opposit n, and it appearing to th satisfaction of this Court that in the best interest of the estate the debtor be adjudicated a bankrupt and that the bankruptcy case proceed forthwith; it is

ORDERED AND ADJUDGED that REA Express, Inc. is a bankrupt under the Bankruptcy Act and that the bankruptcy case proceed pursuant to the provisions of said Act; and it is further

ORDERED AND ADJUDGED that C. Orvis Sowerwine is appointed trustee in bankruptcy of REA Express, Inc. and the amount of his bond is fixed at $100,000; and it is further

ORDERED AND ADJUDGED that the trustee and Irving Trust Company are authorized and directed to honor, to the extent of funds available to them, all checks, heretofore drawn on the account numbered 11-008-112 in the name of REA Express, Inc., debtor in possession, held at Irving Trust Company, issued to employees in payment of services rendered prior to the entry of this order.

Dated: New York, New York
November , 1975

Bankruptcy Judge

United States of America)
Southern District of New York ss

I, JOHN J. CRONIN, Deputy Clerk, in and for the said District, do hereby certify that the foregoing is a true and correct copy of the original entered in my office and now remaining in my custody.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court this 7th day of November, 1975.

JOHN J. CRONIN
Deputy Clerk

By
Chief Clerk

7.

11/10/7

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter :
of :
R.E.A. EXPRESS, INC., f/k/a :
RAILWAY EXPRESS AGENCY, INC.,
Bankrupt. :

No. 75 B 253

FILED

NOV 11 1975

JOHN J. CREGAN,
Bankruptcy Judge

UPON the annexed application of C. Orvis Sowerwine, Trustee herein, duly verified the 6 day of November, 1975, and the affidavit of Joshua J. Angel, a member of the firm of MARCUS & ANGEL, and the affidavit of William Kahn, a member of the fiirm of WHITMAN & RANSOM, both sworn to the 6th day of November, 1975, and it satisfactorily appearing that the said MARCUS & ANGEL and WHITMAN & RANSOM represent no interest adverse to the Trustee or the estate herein in the matters upon which they are to be engaged, and that their employment would be in the best interest of the estate, it is

ORDERED, that the said C. Orvis Sowerwine, the Trustee herein, be and he hereby is authorized to retain MARCUS & ANGEL, and WHITMAN & RANSOM, ESQS., as his attorneys generally and in all matters requiring the services of an attorney in this proceeding.

Dated: New York, New York
November 10th 1975.

John J. Cregan

Bankruptcy Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter	:	
		No. 75 B 253
of	:	
R.E.A. EXPRESS, INC., f/k/a RAILWAY EXPRESS AGENCY, INC., Bankrupt.	:	APPLICATION

TO THE HONORABLE JOHN J. GALGAY, BANKRUPTCY JUDGE:

The application of C. Orvis Sowerwine, respectfully represents:

1. That he is the Trustee herein, duly appointed on the 6 day of November, 1975; that he has duly qualified and is now acting as such Trustee.

2. That on the 18 day of February, 1975, the abovenamed bankrupt filed a petition for an arrangement under Chapter XI, Section 322 of the Bankruptcy Act. That on the 6 day of November, 1975, the bankrupt was duly adjudicated as such and the matter referred to Honorable John J. Galgay.

3. That the bankrupt was engaged in the business of transportation carrier with a place of business located at 215 East 49th Street, New York, New York.

4. In the course of his duties as Trustee herein, your applicant will require the services of counsel to inquire into and uncover the nature and extent of the assets to which, as such Trustee, he may be entitled and to perform the other duties that usually devolve upon an attorney for an estate in bankruptcy. In addition, it is contemplated that the Trustee will be an operating Trustee for a limited period of time and will require the assistance of counsel during said period. Insofar as can be ascertained at this time, the following matters will additionally require the attention of counsel:

a] That applicant will require the services of counsel for the examination of the bankrupt at the first meeting of creditors to ascertain whether there were any irregularities in the operations of the bankrupt and to assist the Trustee in locating and obtaining possession of all assets which properly belong to the estate.

b] That applicant will require the services of counsel to examine into any deficiency of liabilities to assets and to investigate the bankrupt's transactions to ascertain whether there was any diversion of assets and to determine whether proceedings should be brought to seek to recover into the estate any assets which may have been improperly transferred.

c] That applicant will require the assistance of counsel in investigating into the question of such taxes as may be owed by the bankrupt and resisting any tax claims that may be filed in excessive amount.

d] That applicant will require the services of counsel to examine the claims which are filed with the Bankruptcy Judge in order to advise the Trustee whether or not objection should be filed to such claims and wherever possible to reconcile differences between the amount of claims filed and the records of the bankrupt.

e] That applicant will require the services of counsel to investigate the bona fides of any mortgages and to investigate such lien rights as the Trustee may have in real property located in New York, in which property the estate may have an interest.

5. That applicant desires to engage as attorneys for the Trustee herein, MARCUS & ANGEL, Attorneys, at 60 East 56th Street, New York, New York, and WHITMAN & RANSOM, Attorneys, at 522 Fifth Avenue,New York,New York.

6. That to the best of his knowledge, information and belief, the said MARCUS & ANGEL, and WHITMAN & RANSOM, Esqs., have no connection with the bankrupt or its attorneys or with any creditors herein except that they were co-counsel to the creditors committee.

7. That applicant is satisfied that the said MARCUS & ANGEL and WHITMAN & RANSOM represent no interest adverse to the Trustee or the estate of the bankrupt herein in the matters upon which they are to be engaged as counsel except as stated herein

and he feels that it would be to the best interests of the estate that MARCUS & ANGEL and WHITMAN & RANSOM be retained as counsel. Applicant has not received any suggestion or recommendations from anyone as to whom to retain as counsel in this proceeding and that applicant has no connection with the said firms of MARCUS & ANGEL, or WHITMAN & RANSOM, other than as stated hereinbefore.

8. That applicant makes this application for the retention of MARCUS & ANGEL, and WHITMAN & RANSOM, Esqs., as attorneys for the Trustee solely because he feels that said MARCUS & ANGEL and WHITMAN & RANSOM are well qualified to render the Trustee the services which are required herein.

WHEREFORE, applicant respectfully prays that an order be entered herein authorizing him to retain MARCUS & ANGEL and WHITMAN & RANSOM as his attorneys under a general retainer.

Dated: New York, New York
November 6, 1975.

C. Orvis Sowerwine, Trustee

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

In the Matter :

of :

REA EXPRESS, INC. a/k/a :
RAILWAY EXPRESS AGENCY, INC.

:

Bankrupt.

- x

AFFIDAVIT

STATE OF NEW YORK)
: ss.
COUNTY OF NEW YORK)

C. ORVIS SOWERWINE, being duly sworn, deposes and says: That he is the Trustee in the Bankruptcy of REA EXPRESS, INC., a/k/a RAILWAY EXPRESS AGENCY, INC., and he has read the foregoing petition and knows the contents thereof; and that the same is true to his own knowledge, information and belief.

C. Orvis Sowerwine
Trustee

Sworn to before me this
6th day of November, 1975.

JAMES H. CELL
Notary Public, State of New York
No. 31-5351325
Qualified in New York County
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

In the Matter : AFFIDAVIT

of :

REA EXPRESS, INC. a/k/a :
RAILWAY EXPRESS AGENCY, INC.
Bankrupt. :

- x

STATE OF NEW YORK)
: ss.
COUNTY OF NEW YORK)

JOSHUA J. ANGEL, being duly sworn, deposes and says:

That he is a member of the firm of MARCUS & ANGEL, ESQS., of 60 East 56th Street, New York, New York, and that the said firm has no connection with the bankrupt, creditors or any other party in interest, or their respective attorneys except as follows: that the said firm of MARCUS & ANGEL were co-counsel to the creditors committee.

That your deponent represents no interest adverse to the Trustee of the estate in the matters upon which it is to be engaged.

MARCUS & ANGEL

BY _____
Joshua J. Angel
Member of the Firm

Sworn to before me this
6th day of November 1975.

Louise A. Vigliotti

LOUISE A. VIGLIOTTI
NOTARY PUBLIC, STATE OF NEW YORK
No. 24-7513564
Qualified in Kings County
Commission Expires April 30, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - x

In the Matter :

of : AFFIDAVIT

REA EXPRESS, INC. a/k/a :
RAILWAY EXPRESS AGENCY, INC.

:

Bankrupt.

- - - - - - - - - - - - - - - - - - - x

STATE OF NEW YORK)
: ss.
COUNTY OF NEW YORK)

WILLIAM KAHN, being duly sworn, deposes and says:

That he is a member of the firm of WHITMAN & RANSOM, ESQS., of 522 Fifth Avenue, New York, New York, and that the said firm has no connection with the bankrupt, creditors or any other party in interest, or their respective attorneys except as follows: that the said firm of WHITMAN & RANSOM were co-counsel to the creditors committee.

That your deponent represents no interest adverse to the Trustee of the estate in the matter upon which it is to be engaged.

WHITMAN & RANSOM

by: William Kahn

William Kahn
Member of the Firm

Sworn to before me this
6th day of November, 1975.

Patricia A. Cassese

PATRICIA A. CASSESE
NOTARY PUBLIC, State of New York
No. 60-0327855 Qual. in West. County
Certificate Filed in New York County
Commission Expires March 30, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re REA EXPRESS, INC., f/k/a RAILWAY EXPRESS AGENCY, INC., Bankrupt	No. 75 B 253 OPINION & ORDER

JOHN J. GALGAY - Bankruptcy Judge

INTRODUCTION

This matter came before the court upon an application by the trustee for authorization to dispose of all operating authorities, customer lists, tradenames, and trademarks of the bankrupt estate of Rea Express, Inc. ("REA"). A hearing to determine why an order should not be signed authorizing the trustee to accept an offer by Alltrans-U.S.A. was commenced on June 23, 1976 and continued on June 24, 25 and 30, and July 1, 8, and 9.

The bankrupt, which filed a petition for arrangement under Chapter XI of the Bankruptcy Act and was subsequently adjudicated a bankrupt on November 6, 1975, was engaged in the business of surface and air express shipments throughout the United States, and provided international transportation services and custom brokerage. The trustee currently operates only one division--Rexco--of the original operation.

REA's national operations are under the regulatory jurisdiction of the Interstate Commerce Commission and the Civil Aeronautics Board. The Bankrupt was the only nationwide express service in the United States. It furnished its unique and highly valued services pursuant to an extensive and complex group of operating authorities. All the parties involved in this proceeding have agreed that these authorities are the single most valuable asset of the estate, and that they form the largest aggregate of interstate and intrastate operating authorities under the jurisdiction of the Interstate Commerce Commission and various state regulatory agencies of any company in the United States. These rights consist of many certificates of public convenience and necessity, some of which are permanent, some temporary, some based on grandfather rights, and some of which are the subject of proceedings pending before the ICC which have been brought by REA's competitors. The technical nature of the myriad rights involved herein prohibits a detailed description of them.

There are four proposals for the assumption of REA's operating authorities. Two were presented to the trustee in advance of the June 23rd hearing, and two were offered at the hearing for the first time. The importance of the disposition of these highly valuable assets requires a great deal of consideration on the part of this court. The choice of who is to succeed REA in operating under these

unique authorities demands careful examination of the four proposals to see which is in the best interests of the bankrupt estate. It should be pointed out that consistent with this goal, the order of the court authorizing this proceeding established the condition that the lease or sale or other disposition of the authorities be without warranties by the trustee and without recourse against the trustee or the estate. In addition, the trustee announced several conditions at the hearing which he felt were in the best interests of the estate. He requested that there be no division or [illegible] splitting of the authorities, that no offer be accepted which is contingent upon the continued operation of Rexco, that no plan be accepted which risks those assets currently in the possession of the trustee without a suitable guarantee, as well as other measures disigned to protect the estate.

The following is a brief summary of the highlights of the various offers based on the written proposals, oral presentations by counsel, the testimony of various witnesses, and the exhibits offered into evidence at the hearing.

1. The Proposal of Alltrans Express - U.S.A.

The first proposal to be discussed and the one favored by the trustee is that submitted by Alltrans Express- U.S.A. (presently named Alltrans Express of California, Inc.), a member of an international system of transportation companies headed by Thomas

Nationwide Transport, Ltd., an Australian company. This system conducts nationwide and worldwide operations of general commodity express and freight forwarder freight services and ocean shipping, as well as extensive motor carrier operations in this and other countries. The combined assets of the system are US $190,000,000.

According to the Alltrans proposal, the corporate structure of Alltrans Express-U.S.A. and the other subsidiaries of Alltrans, Inc. will be reorganized. In this reorganization, Alltrans Express-U.S.A., the motor carrier, will assimilate the management personnel and become the immediate parent of Acme Fast Freight, Inc., an authorized nationwide freight forwarder. The proposal states that at the time of the execution of the proposed contract, Alltrans Express-U.S.A. will have a net worth of approximately $4,700,00 and will own or control properties with a net worth of approximately $5,600,000.

In their proposal submitted to the court, Alltrans Express-U.S.A. has offered, subject to negotiation and execution of a formal contract and approval by the court, to lease, or at its option, to assume operational control of and responsiblity for all surface operating authorities (permanent and or temporary, as an express company, a motor carrier, and/or freight forwarder), good will, customer lists and all pertinent traffic and sales records of the debtor. This lease shall be operative for ten years or until such time as all

applications by the debtors for permanent authorites now pending before the Interstate Commerce Commission are finally determined, whichever occurs first.

Thereafter Alltrans proposes to purchase the authorities free and clear of encumbrances, debts, or obligations.

The consideration offered for the lease, control and purchase of the operating authorities, etc., as presented in the amended proposal submitted to the court, is 1½%of the annual gross revenues from transportation generated under such authorities for ten years. This does not include Rexco revenues for which 2% of the gross annual figure will be paid to the trustee.

The consideration is to be paid in the following manner. An advance payment of $2,500,000 is to be made upon receipt of temporary authorities from the ICC in a form acceptable to Alltrans Express-U.S.A. No further payments are to be made until gross revenues accumulate to $100,000,000, thus absorbing the advance. Thereafter, the consideration is to be paid annually on or before a date to be agreed upon.

The revenues projected by Alltrans will be guaranteed. At 1¼% this guarantee would amount to $9,569,000 in revenues to the trustee. Alltrans has also offered to pay 1% annually on the excess earnings of Acme Fast Freight above a 12% allowance for normal growth rate and inflation. In addition, Alltrans Express-U.S.A. has offered to

prepare, file and prosecute at its own expense all necessary applications for regulatory approval of the proposed transaction. Recognizing that the support of the trustee would be essential, Alltrans Express-U.S.A. would reimburse the trustee for expenses incurred in his cooperation.

This offer by Alltrans is not without terms and conditions. The most important of these conditions is that the entire transaction is contingent upon prior authorization by the ICC of temporary lease (or operational control) under Section 210a(b) of the Interstate Commerce Act in a form acceptable to Alltrans Express-U.S.A. (i.e. without restrictions which would impair the usefulness of the rights to conduct a general express service). Thereafter, the long term lease or operational control and the purchase are to be contingent upon receipt of all requisite authorization under Section 5 of the Interstate Commerce Act and other applicable statutes.

Due to the instability of the debtor's operating authorities, Alltrans-Express-U.S.A. has reserved the right, at its option, to terminate the agreement with notice if Alltrans Express-U.S.A. cannot obtain temporary lease or temporary operational control from the ICC in a form acceptable to them. Alltrans Express-U.S.A. may also terminate the agreement at any time the debtors are, by final effective order, prohibited from conducting a general express

service over routes and between points substantially equivalent to those set forth in the existing certificates, temporary authorites and pending applications of the debtors. In the event of such termination, all amounts theretofore paid to the trustee as consideration would be retained by the trustee and would constitute payment of full consideration and liquidated damages against Alltrans Express-U.S.A.

Upon the issuance of temporary authorization, Alltrans proposes to resume, or cause the debtors to resume a general express service for package and less than truck load as well as truckload traffic and expand such service as rapidly as the traffic demands and efficient operation practices and financial prudence permit.

Alltrans has also stated in the proposal its intention to give preference, in supplementing the personnel needed during the first two years, to former REA employees who qualify under the standards of Alltrans Express-U.S.A. system as new employees in the proposed operations.

2. The Reaemco Proposal

The Reaemco proposal was the first plan in response to the trustee's need to dispose of the principal assets of REA Express, Inc., specifically, temporary and permanent operating authorities. The trustee recognized that he could not obtain a lump sum payment and therefore became receptive to a plan which would provide a percentage of revenues over a period of years. In discussions

between Mr. Arthur Wisehart and the Trustee, the beginnings of a plan which would enable an employee-sponsored company to assume the operating rights of REA Holding Corp. were formulated. Mr. Wisehart and Mr. F. Ralph Nogg expanded upon this idea which led to the incorporation of REAEMCO, a Delaware corporation.

The REAEMCO plan proposes that either REAMEMCO or the employee's voting trust purchase the shares of stock of the bankrupt REA Express, Inc. from the trustee in bankruptcy of REA Holding Corp., the present owner of at lease 98% of such shares. The plan contemplates that REA Express Inc., will be "delivered free and clear of debt by the trustee in bankruptcy, (a) when Chapter XI administration claims relating to BRAC employees are waived. (b) when claims by BRAC employees and when claims of post-chapter and pre-chapter creditor's have been fully or partially paid in a ten year maximum period."[1] In addition, the plan suggests an assignment of all litigation now being pursued by the trustee, with 25% of the proceeds after expense of these claims to be used for accelerated payments to the trustee.

Following the sale or transfer of such stock, Reaemco will commence traditional express-type operations, but would not be fully operational until the second year. Reaemco's revenue, in its first operating year, will be derived predominantly from the Rexco and flat car operations. To date, no written committments

1 Reaemco proposal p. 4, point 1.

have been received for any terminal lease. The operating company, Reaemco, will employ mostly former REA personnel, and will, hopefully, employ more than 800 workers at the end of its first calendar year. For a five-year period, the voting trust will set employee compensation based upon an operating ratio of 95%.

Reaemco, through the voting trust, proposes to obtain funds of approximately $3,000,000, less a finder's fee of 5%, through the effort of Smith Finance Corp. These funds will be diverted to the operating company as "start-up" funds. No written committment has been received by Mr. Smith from any lending institution. In addition, Mr. Smith has no written agreement with Reaemco.

Employees will participate in company ownership through a voluntary payroll deduction of 10% of their salaries for the purchase of stock in the holding company. That stock will remain in the voting trust, earning interest, until creditor's claims have been satisfied by the accumulated funds. Provisions are included to make available non-voting preferred stock to those investors who contribute to "start-up" capital and, also, to old stockholders of REA Express, Inc. Should additional working capital be required, Reaemco proposes to factor its accounts receivable. No written committment has been received from any financial institution to factor such accounts.

Over a ten-year period, Reaemco proposes to offer an increasing percentage of revenue to REA Express, Inc.'s creditors eventually reaching the level of 3% of gross revenue. According to Reaemco projections, at the end of this period, the amount which will have been paid to the estate will be in excess of $70,000,000.

3. Proposal by All Truck Express, Inc.

All Truck Express, Inc., ("All Truck"), a Michigan corporation in the process of formation as a subsidiary of R-W Service System, Inc., which is in turn a subsidiary of the McLouth Steel Corporation, proposes to assume operational control and ultimately purchase that portion of the operating authorities presently used by the Rexco Division of REA. This offer was intended to "supplement and improve upon" the other proposals before the court by assuming only those authorites under which the line-haul, or terminal to terminal operations were formerly provided by REA. All Truck claims that it is experienced in line-haul service similar to that conducted by Rexco, and that its proposal, taken in conjunction with one of the other plans, would offer the estate, the creditors, and the shipping public a "substantially improved, more rounded proposal." On June 25th, All Truck requested the court to consider its proposal as a supplement to the Reaemco plan and that if awarded the Rexco portion of the operating authorities,

All Truck would execute a fifty-year renewable agreement with Reaemco whereby it would operate both the direct truck load service from consignor to consignee and the over-the-road operations relating to the local express service to be conducted by Reaemco. All Truck would furnish all equipment and personnel necessary to continue the Rexco operation. It will hire former REA line-haul personnel if necessary.

All Truck's proposal is contingent upon the continuation of Rexco. In addition, the supplemental proposal presented to the court on July 8, 1976 is based upon the assumption that Reaemco can obtain the stock of REA Express, Inc., thereby allowing Reaemco to acquire the operating rights without the approval of the ICC.

In consideration for the line-haul authorities, All Truck will pay ½% on all over-the-road annual gross revenues from transportation under such authorities for a period of 10 years. There would be an advance payment of $1,000,000 upon the initiation of operations by All Truck to be held in an escrow account. This account would insure payment of the first million dollars due the the trustee. The 1½% will be paid on Reaemco's behalf directly to the trustee, initially out of the escrow account. 40% of the operating profit (revenues less expenses) will go to Reaemco, while All Truck will retain 60% of the operating profit, (the 1½ payment will be regarded as an operating expense). The projected

total revenue to the trustee over the ten-year period is $8,798,000. If All Truck cannot continue operations during the term for any reason, all monies paid shall be forfeited, but All Truck shall be relieved from any further obligation to the trustee.

4. Proposal of ABC Freight Forwarding Corporation

ABC Freight Forwarding Corporation ("ABC") is the holding company of ABC-Trans National Transport, Inc., a freight forwarder under Part IV of the ICC. ABC has been a nationwide freight forwarder for both air and surface freight since 1941.

ABC has offered to lease or assume operational control of REA's surface operating authorities for ten years or until such time as all REA's applications for permanent authorities are determined by the ICC, whichever occurs first, at which time it will then purchase the authorities. The transaction is contingent upon temporary approval by the ICC and further conditioned on the representation that the Rexco Division operations will be continued and generating $1,000,000 of revenue per month. If the Rexco operation does not generate the level of revenue at the time that ABC would assume control of the authorities, ABC reserves the right to amend or withdraw its offer.

In its ammended proposal presented to the court on July 1, 1976, ABC also reserved the right to assign the operating authorities to a third party of its choosing.

In consideration for control and ultimate purchase of REA's authorities, ABC will tender to the trustee 3% of the annual gross revenues from transportation under such authorities for ten years, however, if such payments amount to $10,000,000 before expiration of the ten-year period, the annual percentage of gross revenues paid to the trustee will drop to 1% for the remainder of the period.

ABC will make an advance payment of $2,000,000 upon the grant of temporary authority by the ICC, and the initial annual payments shall be made from this fund. ABC guarantees $4,200,000 to the trustee by the end of the ten-year period. Its projections indicate that the total payments to the estate will reach $10,000,000 by the seventh year of operation under the authorities. Further payments at the 1% rate for years 8, 9 and 10 will amount to approximately$3,250,000. ABC will bear the expense of prosecuting all necessary applications for regulatory authority, and will reimburse the trustee for his expenses in the event that his cooperation is needed.

Qualified former REA employees would be hired as required, however they will be junior in seniority to ABC's own employees and will not be eligible for benefits under the Railroad Retirement Act.

After careful study I find that neither the Alltruck nor ABC offers measure up to that offered by Alltrans, therefore the choice is between the Alltrans and Reaemco offers.

The Alltruck offer is for only part of the authorities offered for sale. Since this court has not been persuaded that a partial disposition of the assets will result in a greater benefit to the estate, the Alltruck proposal must be viewed solely in conjunction with the Reaemco plan. Therefore, Alltruck's offer need not be considered separately. The ABC proposal also raises several problems. To begin with ABC has made their offer contingent upon the continuation of Rexco, and further conditioned on the representation that Rexco is generating $12,000,000 of revenue annually, these are [illegible] guarantees which the trustee is not in a position to make. Furthermore, ABC requests blanket authority to assign the operating rights to a third party. Because a primary concern of this court is the successful bidder's ability to generate substantial revenues in the express business, a portion of which will go to the estate, the authorities cannot be allowed to land in the hands of the unknown.

DISCUSSION

The obvious distinction between the Alltrans proposal and that of Reaemco is that one is made by a financially sound enterprise

and offers a fair and reasonable value for the operating rights which are the subject of these proceedings. The other, Reaemco, involves a high degree of risk in many of its features. The attractiveness of Reaemco's offer is that it provides a possibility of resurrecting the oldest and most famous express company in the country together with the opportunity to allow former REA employees to own and operate the new enterprise.

On balance I find that the risks are far too great to warrant authorizing the granting of these operating rights by the trustee to Reaemco.

One of the risks is the problem of financing the Reaemco venture. I am not satisfied that Reaemco has unqualified access to 3 million dollars to start this venture nor am I satisfied that 3 million dollars would be enough to carry out its planned operation.

Mr. Nogg, the transportation consultant who testifed for the Reaemco plan, has very impressive credentials in the field and I admire him for the enthusiasm as well as the skill he displayed in presenting his position. I also applaud his effort to create employment opportunity for former REA employees. However, I am not persuaded that his projections and predictions are solid enough to justify the court's embracing the Reaemco proposal.

I find great difficulty in accepting his position that there are large numbers of express customers who will give their patronage to Reaemco forthwith or that competitors who filled the void when REA went out of business would surrender those customers without a fight.

I give considerable weight to the trustee's recommendation as to the disposition of these rights. In his statement to the court at the end of these hearings, he expressed an awareness of his duties and the need to marshall the assets and obtain the maximum amount as efficiently and inexpensively as possible. I am satisfied that he and his counsel have carefully considered all the benefits and weaknesses of each proposal as well as choosing the proposal he recommends as the one involving the least risk to the estate and the assets thereof. I agree with his conclusion that the Reaemco proposal is much more risky, much slower in being activated and has a substantially higher chance of failure than the Alltrans proposal.

Based on the total record before me I find:

1. That the offer of Alltrans as amended on the record during the hearings, represents a fair and reasonable value for the Property;
2. That the Alltrans offer is the best offer which was submitted to the Court for consideration at such hearing;

3. That the acceptance of the Alltrans offer is in the best interests of the bankrupt estate;

4. That the Alltrans offer provides the probability of the greatest realization to the bankrupt estate from the sale of the property;

5. That the attorneys for the Trustee and the attorneys for Reaemco have stipulated that if a proper petition for reorganization under Chapter X of the Bankruptcy Act was or is properly filed before this Court, that the entire record made of these hearings, including but not limited to the order fixing the hearing, the application for such order and exhibits annexed, the stenographic transcript of all hearings and the exhibits introduced by all parties, the memorandum decision of this court and this order, shall constitute the entire record in support of such petition by such petitioning creditors;

6. That it would be adverse to the interests of the bankrupt estate that any assets of the bankrupt presently in the hands of the Trustee be put at risk to enable the trustee to continue expand an express business, other than the continued operation of the REXCO division by the Trustee pending the final disposition of the Property.

It is, therefore,

ORDERED, that the Trustee be and he hereby is authorized and directed to accept the offer of Alltrans annexed to the Trustee's application dated May 21, 1976, as amended by Alltrans on the record during the hearings, and it is further

ORDERED, that the Trustee and Alltrans and their counsel forthwith prepare a written contract embodying the terms and conditions of such amended offer, such terms and conditions to be consistent with such amended offer or the Trustee's conditions announced and modified at the hearing on July 8, 1976 and it is further

ORDERED, that such contract be submitted to this Court for examination and approval within ten (10) days from the date of the entry of this order, and it is further

ORDERED, that the Trustee apply for a further order approving the terms and conditions of such contract and authorization to execute such contract simultaneously with the submission of such contract to this Court.

DATED: New York, New York
July 16th 1976

John J. Galgay

JOHN J. GALGAY
Bankruptcy Judge

GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

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Memorandum

TO : RAYMOND BURGHARDT
Clerk of the Court

DATE: September 15, 1976

FROM : JUDGE HENRY F. WERKER

SUBJECT: REA EXPRESS, INC., BANKRUPT 75 B 0253

Since a Chapter 10 petition has apparently been filed in the above-captioned matter, the appeal of REAEMCO is no longer properly before me. For this reason, I am returning the Part I files to you.

As additional correspondence related to this appeal arrives in my chambers, I will forward it to you.

Thank you.

H. F. W

9010-110

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

In the Matter

of

REA EXPRESS

Bankrupt

No. 75 B 253

U.S. Courthouse
Foley Square
New York, New York

September 27, 1976

B E F O R E:

HON. JOHN J. GALGAY,

Bankruptcy Judge

RAYVID REPORTING SERVICE
CERTIFIED STENOTYPE REPORTERS
150 NASSAU STREET
NEW YORK, N. Y. 10038
CORTLANDT 7-3877
3878

A P P E A R A N C E S:

MARCUS & ANGEL, ESQS.,
60 East 56th Street
New York, New York

BY: JOSHUA J. ANGEL, Esq., of Counsel.

WISEHART, FRIOU & KOCH, ESQS.,
Attorneys for Reameco,
150 East 42nd Street
New York, New York

BY: ARTHUR M. WISEHART, Esq., of Counsel
- and -
ROBERT E. FRIOU, Esq., of Counsel.

- - -

THE JUDGE: This is the order to show cause regarding the appointment of a receiver.

MR. WISEHART: Speaking on behalf of the petitioners on the order to show cause, I think I have an obligation to bring to your attention a preliminary matter which we have just discovered in conference with the Clerk's Office, Mrs. Minkoff, who are bot here in court and can confirm what I am about to tell you.

I think that what I am about to tell you will make it all the more clear that we should proceed to establish the

necessary transitional arrangements in order to protect the bankrupt estate in connection with the anticipated transfer of this to a Chapter X proceeding.

I hand, Your Honor, a copy of a memorandum dated September 15, 1976 from Judge Worker, which the Clerk's Office received, in which Judge Worker states that "Since a Chapter X petition has apparently been filed in the above-captioned matter, the appeal of Reameco is no longer properly before me.

For this reason, I am returning the part one files to you."

Now, of course, Your Honor, immediately recognized that Judge Worker used the word "apparently". The Clerk's Office has the check, the exhibits that were transferred to Judge Worker's office in connection with the appeal, have not been located. That is where the original copy of the Chapter X petition is located.

Now, I think that shortly, we have

not had occasion to check with your office. It may be that the exhibits are there, but that is where the petition --

THE JUDGE: No, Mr. Friou has been through my office with a fine tooth comb. As I recall at the hearing, the seven-day hearing, we had on the determination of rights, at one point you handed up a -- the original of a Chapter X petition.

MR. WISEHART: That is correct.

THE JUDGE: As I recall it was marked for identification.

MR. WISEHART: That is correct.

THE JUDGE: It was assigned an exhibit number.

MR. WISEHART: As Petitioner's Exhibit 25, I believe.

THE JUDGE: So if the original can't be found, why can't a copy be --

MR. WISEHART: A copy can and will be susstituted if that's necessary. I just bring this to your attention because we just learned of this development.

'REA

Now, it seems to me that in view of this situation in which Judge Worker concludes that it apparently has been filed and in which the transfer to a Chapter X proceeding is a situation which, forthe purpose of discussion, we should regard as imminent in this bankrupt estate and having in view the various interests that are involved, counsel for the trustee should be directed forthwith to respond to the order to show cause that Your Honor signed.

Now, the fact is that they have come in with an affidavit which is not responsive to the order to show cause and is a scurrilous piece of paper in which Mr. Angel, entirely without justification, refers to this firm in personal terms, which he had no reason to do so and says that --

THE JUDGE: Mr. Wischart, don't trouble with Mr. Angel's excesses if he has them. We have been through this for many weeks.

MR. WISEHART: I am accustomed to his

'REA

excesses so I won't go into detail.

THE JUDGE: I say if he has any.

MR. WISEHART: Yes, but the fact is that the purpose of the order to show cause is to bring about the necessary transitional arrangements which will permit an orderly transfer to a Chapter X proceeding.

Now, I submit to Your Honor that the trustee and his counsel have an obligation to cooperate in that. I have in mind the fact that when we all were in law school the example usally given in the torts class was if a man is walking over a bridge and there is somebody struggling in the water, does he have any duty to jump in the water and help that person that is in trouble and, of course, the answer is no.

THE JUDGE: Particuarly if Mr. Angel can't swim.

MR. WISEHART: But if Mr. Angel or anybody else should jump in the water, then he does have a duty, he can't just turn his back and swim away and pay no

attention.

He has undertaken and the trustee and his counsel have undertaken a commitment here which puts upon them the obligation to work cooperatively.

THE JUDGE: Let's face up to the issue that troubles me and the one that I discussed very briefly with your partner, Mr. Friou. That is the question of the local district rule, which governs the appointment of receivers.

MR. WISEHART: Yes, may I address myself to those rules?

We have submitted a memorandum on the rules regarding the appointment of a receiver. We have carefully studied the local district rules and we have also carefully studied the bankruptcy rules.

THE JUDGE: And you come to the conclusion that the bankruptcy rules supersede the district court rules and therefore I should appoint a receiver?

MR. WISEHART: That is correct.

THE JUDGE: Well, I am not about to take on the twenty-six judges of this district court.

MR. WISEHART: Well, let me remind Your Honor of one thing. The bankruptcy rules were promulgated by the U.S. Supreme Court subsequent to these local bankruptcy rules, which are somewhat out of date, as Your Honor must recognize.

Now, the U.S. Supreme Court is the law of the land and it is a far more serious thing to take on the U.S. Supreme Court then it is the district judges because the district judges themselves are obligated to follow the procedures which the U.S. Supreme Court has established.

The fact is, as Your Honor knows, the district judges through their rules have not had occasion to adjust and adapt those rules to reflect the changes which the U.S. Supreme Court has made in the rules relating to the appointment of a receiver.

Now, there is no possible ambiguity

in those Supreme Court rules.

They do provide for the appointment of a receiver by the "court" and the court is defined in such a way as to make it clear that it is the bankruptcy court and that's the only sensible way to construe those rules. Because as Your Honor recognizes the place for a hearing on factual issues under the new procedure established by the Supreme Court is in the bankruptcy court.

The district court has become a court of appeal. It is not equipped or even permitted to consider the factual record which must be made on an application of this kind, Your Honor.

THE JUDGE: Well, by nature I am a very modest fellow, Mr.Wisehart. I suggest toyou that you would add greatly to my comfort if you had addressed your argument to Judge Chief Edelstein because he is the one who is most conscious of our local district court rules.

You may be one hundred percent right, I am not sure, but I would direct you to immediately proceed to whatever district court judge should appropriately hear it under the old rules.

If he finds that the bankruptcy rules supersede the district court rules, let him say so. I think it would be in poor grace for me to tell them that.

MR. WISEHART: No, Your Honor, may I respectfully and with the greatest deference point out that really you have the obligation to make the initial determination because under Rule 509C of the Bankruptcy Rules, if you conclude that this is not the proper place for filing this petition, then it is for you to transfer it to where you think it is the proper place for filing this petition, then it is for you to transfer it to where you think it is the proper place.

Now, we submit and I stake my reputation as an attorney on this, that this

is the proper place. We have carefully looking into that question. We have reached a conclusion and that is a most serious conclusion because it seems to us clearly to be consonant with the best interests of the bankrupt estate.

THE JUDGE: We are very fortunate here in the Southern District where we have all three courts right here in the one building.

So my suggestion to you, as a matter of fact, my order to you is to proceed at your choice either before the judge sitting in part one forthwith or to Chief Judge Edelstein for the appointment of a receiver.

I am sure you will move with the clarity [MACRI] that you do here and inform them as to what you think the local rule -- what the status of the local rule is vis-a-vis the Bankruptcy Rules.

I think you can do that without any furtherpapers, just as you appear here, take them upstairs and you might want to

check with the Clerk's Office to see if they recommend that you go to the Chief Judge or the judge sitting in part one.

But you are not going to lose any time. If it is my obligation to appoint a receiver under the local rules, come back and then we will have a hearing on that.

Do you want to be heard.

MR. ANGEL: No, Your Honor, because the position that the court has taken is exactly the position that we took in our affidavit in opposition to this motion, to wit: That the local rule 8 is very clear in that this application can only be made to the district court.

Additionally, I am somewhat chagrined that I have not received a copy of Judge Worker's memo. I would appreciate a copy forthwith.

MR. FRIOU: Here, we just got it a minute ago (handing). We just received that -- I want the record to show my comment.

MR. ANGEL: This is the first that I heard about it. I am not unhappy with Judge Worker's decision because I think that we can now move forthwith to have this petition dismissed and that would be our intent, obviously.

THE JUDGE: Well, I think you have to make another determination as to whether or not this memo, which appears to be a memo, whether or not it is in fact an opinion from which an appeal can be taken, I don't know.

MR. ANGEL: I don't know, Your Honor. I will discussthat with Mr. Kahn, who unfortunately is today in Minneapolis.

THE JUDGE: Well, your time is running from the date of the filing, which is September 15th.

MR. WISEHART: If the clerk in the courtroom has the original copy.

THE JUDGE: When was it docketed?

MRS. BERRAN: I received it on the 15th.

MR. FRIOU: Of September.

MR. WISEHART: Mrs. Berran, from the Clerk's Office of the U.S. District Court.

MR. ANGEL: Are we to assume that the Chapter X petition therefore has been filed as of the 15th? I don't know.

THE JUDGE: I don't know. Anything Judge Worker decides, he decides. Once the matter left the bankruptcy court, I don't think I have any further authority to deal with it while it is in the district court.

MR. ANGEL: Then, the only position that the trustee takes at the present time is that contained in the affidavit in opposition which is exactly the court's position, that this matter is not properly before this court on the appointment of a receiver.

MR. WISEHART: No, that is not the court's position. Unless I am mistaken and we may be questioned on this before the district judge, Your Honor, and I think it

should be clear what the court's position is. If the court's position is that it is not ruling until it is further instructed by the district court, that would be one thing.

THE JUDGE: Well, I suppose in order to bring it before the district court, I have to say that I am bound by the district court rules and then let the district court judge tell me whether or not I am in error.

But I think that you can have that determined very, very promptly. I don't want to do anything that would put this estate in jeopardy.

I would urge you to move with all speed and dispatch that you can to get it before either the Chief Judge or the judge sitting in -- what is it called, the miscellaneous part?

MR. FRIOU: Part one.

THE JUDGE: Part one.

MR. FRIOU: Judge Duffy.

THE JUDGE: I would suggest that

you take the original papers with you.

MR. WISEHART: I would like for the record also to show that we have present in the courtroom Mr. Nogg, who is prepared to testify in support --

THE JUDGE: I recognize Mr. Nogg in connection with seven days previously.

MR. WISEHART: In connection with the application that was made. We are prepared to have Mr. Noonan testify, who is available on the floor and we also have signed petitions from over one hundred former employees who are creditors in all parts of the country.

These were received in a very short period of time seeking to have a receiver appointed in this case.

Furthermore, we are prepared to introduce testimony indicating that the status of the records and the proofs of claim filed are in a very difficult condition to work with and that over 4,000 creditors who have proofs of claim were not

mailed notices of the hearings regarding the Reameco and the Alltrans proposals.

THE JUDGE: Mr. Wisehart, you are going upstairs on a very simple issue.

Let's keep that record clear. The three papers that were handed up to me this morning were one, a memo from Judge Henry [illegible] Worker to Raymond Burkhart, the Clerk of the US District Court. I am making that part of this record.

The memorandum in opposition to the motion to dismiss the application for the assignment of a receiver handed up to me by Mr. Wisehart and an affidavit for application to motion for the appointment of a receiver.

That is Mr. Angel's language, not mine, handed up by Mr. Angel.

MR. WISEHART: Your Honor, may we offer these signed petitions in support of the application, since we do have the originals here as part of the record.

THE JUDGE: I really don't think they belong part of this record. When you

have a hearing on the appointment of a receiver, that is where they belong.

MR. WISEHART: All right, we will make them an offer of proof.

THE JUDGE: They won't be lost between now and your return when you come back.

MR. WISEHART: Thank you very much for your consideration in this matter.

THE JUDGE: And I suggest you do move promptly.

MR. WISEHART: We will immediately go to the part one judge.

MR. FRIOU: We will ask counsel for the trustee --

MR. WISEHART: To cooperate.

THE JUDGE: Mr. Angel, I gather that your interest is sufficiently steep in this matter to go along.

MR. ANGEL: Yes, except we have one meeting right now and then if counsel will wait, I will be happy to accompany them.

THE JUDGE: I shouldn't think anything is more important right now than Railway Express.

MR. ANGEL: I have a command appearance before Judge Babitt and that won't take more than a few minutes.

MR. FRIOU: We are going up there immediately. The judge may be at lunch.

MR. WISEHART: We are going to see him immediately and we hope Mr. Angel will accompany us.

THE JUDGE: I am sure he will.

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WISEHART, PRIOR & KOCH
FOURTH FLOOR
150 EAST 42ND STREET
NEW YORK, NEW YORK 10017

TELEPHONE
(212) 697-8800

September 21, 1976

Hon. Raymond Burghardt
Clerk
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: REA Express, Inc., Bankrupt, 75-B-0253

Dear Mr. Burghardt:

On behalf of certain former employees who are creditors of the bankrupt, REA Express, Inc., we applied for the appointment of a receiver in the above matter. The application was brought on by an Order to Show Cause submitted to Judge Galgay on September 10, 1976 (and signed by him on September 15, 1976). The hearing before Judge Galgay took place today. In view of the possible conflict between the Bankruptcy Rules promulgated by the United States Supreme Court, which we believe indicate that such applications in a pending bankruptcy proceeding go to the bankruptcy judge to whom it has been referred, and the local Bankruptcy Rules of the Southern District of New York, particularly Rule 8(a), promulgated before the Supreme Court's Bankruptcy Rules were issued, Judge Galgay ordered us to seek further instructions from either the Chief Judge or the Part I Judge today.

In Judge Pollack's absence, we followed Judge Galgay's direction by taking the matter up with Chief Judge Edelstein. Chief Judge Edelstein suggested that the most expeditious manner of handling the matter would be to take the application for the appointment of a receiver to your office, for assignment to a District Judge in the usual manner.

We therefore submit said application herewith, and ask that a hearing on said application be set for the earliest possible time. In that connection, we wish to invite your attention to Judge Werker's memorandum dated

September 15, 1976, which we received today, stating that "a Chapter 10 petition has apparently been filed in the above-captioned matter ...." One of the purposes of the application for the appointment of a receiver is to alleviate any administrative difficulties which may ensue from the transition to Chapter 10, in view of the stay provisions thereof. Since part of REA's operations are continuing, the urgency of the matter is readily apparent.

The application for the appointment of a receiver is the same one which was submitted to Judge Galgay. The reference of it in the form submitted to the District Court is consistent with Bankruptcy Rule 509(c), and the exigencies of the situation. We have appended at the end of the application signed petitions from 158 former employees who are also creditors asking that a receiver be appointed. We are also submitting herewith a proposed form of an order to show cause for the use of the District Judge to whom this is assigned, so that a hearing on this matter may be set as expeditiously as possible.

Respectfully submitted,

Arthur M. Wisehart

Arthur M. Wisehart

cc w/encls. (By Hand): Hon. David N. Edelstein, Chief Judge
Hon. John J. Galgay, Bankruptcy Judge
C. Orvis Sowerwine, Esq., Trustee

Counsel to the Trustee:

Marcus & Angel
Whitman & Ransom

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In the Matter of	:	Bankruptcy Numbers
REA HOLDING CORPORATION	:	75-B-0251
THE EXPRESS COMPANY, INC.		75-B-0252
REA EXPRESS, INC., f/k/a Railway Express Agency, Inc.	:	75-B-0253
REXCO SUPPLY CORPORATION,	:	75-B-0254
Bankrupts.	:	APPLICATION FOR AN ORDER APPOINTING RECEIVER

- -x

The application of certain creditors of the bankrupt through their attorneys, Wisehart, Friou & Koch, respectfully alleges:

1. On February 18, 1975, the above-named bankrupt filed a petition for an arrangement under Section 322 of Chapter XI of the Bankruptcy Act.

2. On February 18, 1975, this Court entered an order authorizing the Debtor-in-Possession to operate its business.

3. The Debtor-in-Possession was engaged in the business of surface and air express shipments throughout the United States under the regulatory jurisdiction of the Interstate Commerce Commission and the Civil Aeronautics Board. It was also engaged in the business of international transportation and custom brokerage.

4. On November 6, 1975, the above-named Debtor was adjudicated a bankrupt by order of this Court. On November 7, 1975, C. Orvis Sowerwine became Trustee.

5. The applicants herein are former employees of the bankrupt who have duly filed claims as creditors including those who have signed the petition for a Chapter X proceeding under the Bankruptcy Act heretofore submitted to this Court.

In addition, substantially all of the bankrupt's former employees with proofs of claim on file herein totaling in excess of $50 million also support this application, based on information supplied by Mr. Robert J. Devlin, International Vice President of the Express Division of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes. This Court's decision with respect to the Chapter X petition and related matters is currently pending before Honorable Henry F. Werker, U.S.D.J., on appeal. If the bankrupt should go into a Chapter X reorganization proceeding, it is obviously in the best interest of all concerned that said transition take place in an orderly, responsible manner, and we have previously offered to cooperate in the formulation of suitable transitional orders to obviate any administrative difficulties. We also believe that the Trustee and his counsel, whether they oppose the filing of the Chapter X petition or not, have the duty of taking prudent action to facilitate an orderly transition, should that become the decision of the Court. An Order to Show Cause is requested for the following reasons:

6. Of utmost importance in the present situation involving the bankrupt are the hearings currently taking place before the Interstate Commerce Commission in Washington, D. C., concerning the operation of REA's REXCO Division, and issues raised with respect thereto by truckers and other competitors. In those hearings, it has been indicated, based upon the observation of persons present, and reports thereof, that the liquidation of REA is being raised as a serious disability involving the continuation of REA's authority and the REXCO operation. Further, reports from those proceedings indicate that the Alltrans proposal is being put forth as a reason for terminating REA's authority. As stated in the report on the

*The letter to the Clerk's Office dated September 21, 1976, submitted herewith, describes an application for similar relief to Bankruptcy Judge Galgay.

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hearing in Traffic World, September 6, 1976, p. 67 (copy attached):

> "'There is no merit to any argument,' the complainants continued, 'that the hub authorities should be continued in order to facilitate a transfer of REA's authorities to other parties.'"

It is obvious that the Trustee and his counsel, having signed a contract with Alltrans, which we deem to be invalid, but which they are committed to promote, are not free agents in opposing such attacks. They must support the Alltrans proposal whether or not that is the result ultimately reached on appeal as being in the best interest of the bankrupt estate, or the position is most likely to result in the preservation of the authority. The fact is that an active appeal is pending from the approval of the Alltrans proposal. In our view, a different alternative must be considered to be a substantial possibility which might result from the appeal, permitting the authority to be preserved without exposing it to the risks inherent in the Alltrans plan. The interests of the bankrupt estate urgently require a more balanced presentation of the situation involving its authorities and its prospects in the hearing before the ICC. We are informed that the hearing may come to an end next week. It therefore is of the utmost importance that action is taken immediately so that such balanced view may be presented before the hearing closes.

7. The Trustee herein and his counsel have previously in this proceeding taken an adamant position favoring REA's liquidation, and opposed to attempts to reorganize REA and expand its current operations. It has been asserted inter alia that this position gives rise to a conflict of interest, a subject which is now also pending on appeal before Judge Werker. The conflict problem is aggravated by the fact that the Trustee and his counsel now feel legally committed to support the approach embodied in the Alltrans proposal.

8. In view of the liquidation posture of the Trustee and his counsel, and the irreparable injury which it is presently inflicting upon REA's very valuable rights, the bankrupt estate, and to the creditors of REA generally, as well as the other

serious conflict of interest issues which have arisen with respect to the Trustee and his counsel, now pending on appeal, we submit that it is in the best interest of all concerned that an operating receiver be appointed pursuant to Bankruptcy Rule 201 without delay, and that the best qualified person to occupy that position would be F. Ralph Nogg or, alternatively, Mr. Dermott Noonan.

9. Mr. Nogg's qualifications as a transportation executive, consultant, and previous Chapter X Trustee, have already been described at length to this Court in the hearings on June 23, 24, 25 and 30, and July 1, 8, and 9, 1976.

10. Mr. Dermott Noonan has had an extensive background in accounting, financial matters, and transportation management. He also has been involved in corporate financing and bankruptcy proceedings. His name has been suggested as a Trustee on behalf of creditors in other proceedings. In the transportation field, he has been associated with Mr. F. Ralph Nogg in the Yale Express Chapter X bankruptcy proceeding which was a successful re-organization. He has also been associated with Mr. Nogg in his endeavors at Associated Transport. Further, following the successful reorganization of Yale Express, he has been a consultant and adviser to the management of the company and the Board of Directors in the current calendar year. Mr. Noonan does not have any conflicting transportation interests or engagements. Mr. Noonan's involvement in transportation goes back over a period of more than twenty years beginning with his activities as an auditor for various transportation companies. Mr. Noonan is regarded as particularly well qualified for the function of receiver pending the qualification of an independent Trustee because of his experience in data processing and financial systems, and the importance of evaluating the various claims of creditors which have been filed and making sure that they are appropriately classified, a function which, on information and belief, has been performed inadequately if at all in

the bankrupt estate despite the lapse of time following adjudication. As previously pointed out, there have been no creditors' meetings since adjudication. The information provided to the creditors to date has been woefully inadequate. Stockholders in public companies customarily receive much more information concerning their interests, and there is absolutely no excuse for the continuation of the cloak of secrecy which has enveloped the administration of this bankrupt estate, where the interests involved (particularly with respect to the former employees) are relatively so much greater.

11. Bankruptcy Rule 201 provides that this Court may appoint a receiver when necessary in the best interest of the estate "(1) to take charge of the property of a bankrupt; (2) to conduct the business of the bankrupt; or (3) to afford representation to the estate in an action, adversary proceeding, or contested matter when no trustee has qualified or the interest of the trustee may be adverse to that of the estate. Such appointment shall be terminated when the trustee qualifies or there is no further need for a receiver, and the authorization to conduct the business of the bankrupt after adjudication shall continue only for such time as may be in the best interest of the estate and consistent with orderly liquidation." Under paragraph (e) thereof it is specified that the court may appoint a receiver after adjudication and on application or on its own initiative. Such appointment is made only after notice to such persons as the court may designate unless it appears that such notice is impracticable or unnecessary. Eligibility is determined by the eligibility rules relating to a trustee under Rule 209(d). Under those rules, Mr. Noonan is eligible.

12. We submit that this is precisely the situation contemplated by the Bankruptcy Rules for the appointment of a receiver. Not only is such a receiver necessary and desirable in order to conduct the business of a bankrupt, and alleviate the

jeopardy to the bankrupt estate caused by the liquidation posture of the present Trustee and counsel, but also because, as we have pointed out previously, the Trustee has an interest adverse to that of the estate in this and ot her matters, having taken an adamant position favoring liquidation.. An issue involving the qualification of the Trustee is pending on appeal, and the Advisory Committee's Note to Bankruptcy Rule 201 specifies that the provision for the appointment of a receiver when the interest of the trustee may be adverse to that of the estate may arise "for example in a proceeding to remove the trustee under Rule 221(a)." While no petition to remove the Trustee as such has been filed, the issue regarding the Trustee's qualification has been duly raised and Rule 221(a) specifies that such removal may take place either on application "or on the court's own initiative ...."

13. Further, Bankruptcy Rule 10-201 also would authorize appointment of a receiver if the Chapter X petition submitted herein is accepted by the Court for filing. We submit that no bond should be required by the applicants in view of the financial distress suffered by the applicants and of the former employees who have lost their jobs, the irreparable injury to which the present administration of the bankrupt estate is exposing them, and the serious disabilities of the Trustee and his counsel.

14. For the foregoing reasons, we submit that the order to show cause submitted herewith should be signed to provide a hearing on these important subjects. Further, the appointment of a receiver would (1) help alleviate the jeopardy into which REA's authority has been placed by the liquidation posture of the Trustee and counsel; (2) provide for an orderly transition in the event that the Chapter X petition which has been submitted is accepted for filing and approved; (3) alleviate

the difficulties in the bankrupt estate caused by the very serious conflict of interest issues involving the Trustee and his counsel which have been brought to the attention of this Court; and (4) permit orderly administration of the estate by making available the experience of a financial and accounting executive with excellent credentials in transportation and bankruptcy matters.

Respectfully submitted,

WISEHART, FRIOU & KOCH

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61

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STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

I, MATTHEW E. MANNING, one of the petitioners named in the foregoing petition, do hereby swear that the statements contained therein are true according to the best of my knowledge, information and belief.

Matthew E. Manning
MATTHEW E. MANNING, Petitioner

Sworn to before me this
16th day of September, 1976.

Robert E. Friou
Notary Public

ROBERT E. FRIOU
Notary Public, State of New York
No. 60-4514054
Qualified in Westchester County
Certificate Filed in New York County
Commission Expires March 30, 1977

CERTIFICATE OF SERVICE

The foregoing Verified Petition was served by causing a true copy thereof to be delivered by hand this 16th day of September, 1976.

Robert E. Friou

C. Orvis Sowerwine, Esq., Trustee
REA Express, Inc., Bankrupt
150 East 42nd Street
New York, New York 10017

Whitman & Ransom, Esqs.
522 Fifth Avenue
New York, New York 10036

Marcus & Angel, Esqs.
60 East 42nd Street
New York, New York 10022

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...st 27 by United Van Lines, Inc., and in exceptions filed August 26 by Global Van Lines, Inc., Smyth Van Line, Inc., and Wheaton Van Lines, Inc., to the decision, served June 25, in MC-F-12560, Continental Van Lines, Inc. – Purchase – Moving Corporation of America, Inc., embracing MC-29, Sub. 6, Continental Van Lines, Inc., Extension—Gateway Removal.

In the embraced proceeding, Continental, of Monterey, Calif., was granted a certificate authorizing it to transport goods between points in Colorado, New Mexico, Texas, Oklahoma, Kansas, Missouri, and Arkansas, over irregular routes (T.W., July 5, p. 84).

The decision was handed down by Judge Richard H. Beddow, Jr., who also approved the acquisition by Norman E. Wiley of control of the rights through the purchase and authorized Continental to tack the purchased rights to its existing rights.

In its exceptions, United said Judge Beddow erred in not finding that the entire certificate of MCA was dormant and should have denied both the purchase application and the related gateway-removal application. The recommended approval would enable Continental to conduct transcontinental operations, United said, "whereas in the past it had fragmented authorities which could not be joined."

"This is wholly unjustified," it said, since the MCA authority "was clearly dormant. . . ."

United said MCA ceased operations in June, 1971, upon the death of its only operating employe. None of eight additional shipments booked by MCA agents, it added, "were moved either in whole or in part under the MCA authority."

Global, Smyth, and Wheaton, in their joint exceptions, said Judge Beddow erred in:

"Failing to find MCA's authority completely dormant and not subject to transfer because of MCA's failure to provide carrier service and its complete cessation of operations.

—"Finding that the complete cessation of MCA's operations for 13 months did not render MCA's certificate dormant because it was 'a matter beyond the control of MCA.

—"Finding that MCA's authority was active on the basis of shipments transported during the first six months of 1971, which was over a year before temporary authority operations were instituted by Continental.

—"Considering shipments which did not move under MCA's certificate as a basis for finding MCA's authority to be active.

—"Not finding, on the basis of the traffic exhibits, that the only portion of MCA's certificates which is not dormant is that to and from Lawrence County, Ill."

Hearings

Excerpts - Traffic World 6 IX 76

ATA, Individual Carriers Urge Commission to Scrap 'Express Service' Concept

With the opening August 30 of ICC hearings into the controversial operations of REA Express' Rexco division, the American Trucking Associations and various individual motor carriers urged the Commission to conclude that nationwide express service—like air express service—is no longer in the public interest and should be scrapped.

The urgings were made in various statements and arguments introduced into evidence in MC-C-8862, Brada Miller Freight System, Inc. v. Rexco, Inc. and REA Express, Inc.

The hearings are expected to run for some time.

They are being conducted before Administrative Law Judge Richard H. Beddow, Jr.

Embraced in the proceeding are MC-C-8861, Schneider Transport, Inc. v. REA Express, Inc.; MC-C-8867, American Trucking Associations, Inc. v. REA Express, Inc.; MC-C-8871, Associated Truck Lines, Inc. et al. v. REA Express, Inc.; MC-66562, Sub. 2315, Part 191, REA Express, Inc.—Petition of American Trucking Associations, Inc. for Dismissal of Application and MC-66562, Sub. 2308 TA, REA Express, Inc.—Petition of American Trucking Associations, Inc. for Cancellation of Temporary Authority.

At issue in the cases are contentions that Rexco, an REA division, is engaging in operations beyond the authority for express service granted by the ICC, and whether REA's motor rights applications should be dismissed and temporary operations discontinued.

Rexco employs owner-operators and hauls truckloads of various commodities under operating rights granted to REA. The operation has sparked considerable controversy, since its rates are substantially below the usual level.

In calling for the scrapping of the express service concept, the complainants contended that "there is simply no reason to superimpose a service such as REA's on the existing system which has proved its ability in the last few years, and particularly in the last nine months, to satisfy the needs of the shipping public."

Several factors, the truckers contend, contributed to the bankruptcy and ultimate liquidation of REA.

For example, the truck lines stated after parcel post size limits were increased, REA lost 10 million shipments a year.

The hub authority proposed by REA Express in an application that is still pending before the Commission, the complainants contended could not and would not restore the firm to its former dominant position in the express industry.

They said the Commission has not recently found an immediate and urgent need for a particular service. The complainants said that more than eight years have passed since the Commission found that such a need existed and that such a finding might not be justified today.

"There is no merit to any argument," the complainants continued, "that the hub authorities should be continued in order to facilitate a transfer of REA's authorities to other parties."

On July 16, the federal judge overseeing REA's liquidation approved the sale of REA's operating rights to Alltrans Express, U.S.A., a subsidiary of an Australian transportation conglomerate, subject to ICC approval (T.W., July 26, p. 101).

When contacted by *Traffic World*, an Alltrans official indicated the finance application will be formally filed with the Commission in early September.

"It is virtually impossible to understand," the truckers asserted, "why the Commission would not require a party to file a new application costing only $350, rather than pay several million for the right to join forces with REA in the prosecution of a stale application for authority which REA has testified is unworkable, inefficient and uneconomical."

"It is respectfully submitted," the carriers said the public interest would be better served by putting this money into terminals and equipment rather than paying off REA's debts."

The complainants also argued that since REA is bankrupt and is being liquidated it is financially unfit to prosecute the pending permanent applications and that they should be dismissed.

"Moreover," the carrier-complainants continued, "under the Rexco operation, this authority has been shown to have a high potential for abuse, with serious detrimental results upon the nation's system of regulated transportation."

In attacking the Rexco operation the complainants accused Rexco division of openly defying 1971 ICC decision denying REA authority to institute irregular route, point-to-point service.

The Rexco operations, the complainants continued, do not meet the basic criteria for a bona-fide express service.

According to the carriers, express service must use vans, provide expeditious transportation and careful handling, operate on authorized established schedules, and use relatively simple billing procedures, rate structures and rate publications.

In addition, the carriers said, an express firm should charge "premium rates" to shippers—rates higher than those of general commodity carriers.

Most of the opening day focused on hammering out a procedural arrangement acceptable to both sides and only one witness was heard.

Counsel for the complainants indicated they intended to focus initially on former Rexco agents and employes. After the employes' testimony, witnesses who conducted a traffic study of Rexco operations will be called to the stand.

Following the traffic study presentation a description will be made of traditional REA operations, and finally a group of carrier witnesses who will try to demonstrate damages incurred by them because of the Rexco operations.

REA's cross examination of the agent and employe witnesses focused three main areas: whether or not Rexco was a division of REA Express or a distinctly different corporate entity; whether the witnesses who had been employed by general commodity freight firms were given more specific information concerning their operations than Rexco gave them; and whether the commodities hauled by the Rexco division could be handled in regular-type vans.

The cross-examination was often quite

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heated. For example, REA's counsel repeatedly referred to the "Rexco division of REA Express" while a carrier witness corrected him and referred to the operation as "Rexco."

Earlier, the REA lawyer observed that the witness had a sign in his briefcase and he forced the witness to produce it and attempted to introduce it as evidence. The sign said: "REA Express, Rexco Division ICC MC-66562, HF 10618."

The witness refused to make the sign available on grounds that "they (Rexco) gave it to me and they aren't going to get it back."

To avoid further controversy the complainant's counsel read the sign into the record and the witness was dismissed.

One thing is sure, there will be much more heated testimony.

As one Commission observer put it, "When you have two sides arguing over a decision involving millions of dollars you are going to see people get hot."

It's not clear when the case will end. As one lawyer participating in the case commented, "I've postponed my vacation with my wife once because of these hearings, and I won't be surprised if I have to do so again."

ICC Cases Assigned for Hearing

ICC cases assigned for hearing or oral argument appear below. The assignments are grouped under separate headings as to rail, water, motor, etc. They will be published as cases. Changes in assignments will be published as announced by the ICC. The number preceding the application number denotes common carrier; A indicates contract carrier.

MOTOR – CHANGES IN ASSIGNMENTS

MC-69492, Sub. 50, Henry Edwards Trucking Co., assigned September 13, at Memphis, Tenn., will be held at Holiday Inn – Rivermont, 200 West Georgia, before Jt. Bd. 25.

MC-141620, United Van Bus Delivery, Minneapolis, Minn., assigned September 13, at St. Paul, Minn., canceled.

MC-C-8733, Cango Corp., McNair Transport, Inc., Robertson Tank Lines, Inc., Chemical Leaman Tank Lines, Inc., Groendyke Transport, Inc. and Western Commercial Transport, Inc. – Investigation and Revocation of Certificates, assigned September 21, at Dallas, Tex., canceled.

MC-119864, Sub. 65, Craig Transportation Co., Perrysburg, O., assigned November 12 (1 day), at Columbus, O., canceled.

MC-124774, Sub. 94, Midwest Refrigerated Express, Inc., Omaha, Neb., assigned September 9, at Boston, Mass., canceled.

MC-116763, Sub. 336, Carl Subler Trucking, Inc., Versailles, O., assigned September 11, at Atlanta, Ga., will be held in Room 405, 1252 West Peachtree St., N.W., before Law Judge White.

MC-117956, Sub 10, Scott Transfer Co., Inc., Atlanta, Ga., assigned September 15, at Atlanta, Ga., will be held in Room 405, 1252 West Peachtree St., N.W., before Law Judge White.

MC-133937, Sub. 16, Carolina Cartage Co., Inc., Greenville, S.C., assigned September 20, at Atlanta, Ga., will be held in Room 405, 1252 West Peachtree St., N.W., before Law Judge White.

MC-F-12650, General Transportation, Inc. – Control and Merger – Fast Transport, Inc., and MC-116457, Sub. 15, General Transportation, Inc., directly related, assigned September 20, at Phoenix, Ariz., canceled and reassigned December 11 (1 week), at Phoenix, Ariz.

MC-C-9025, Knox Transfer Co. v. Jacobs Transfer, Inc., assigned October 5, at Washington, D.C., canceled and reassigned October 19, at Washington, D.C.

MC-C-9027, Valdez Transfer, All-State Moving & Storage, Inc. and Colonial Moving & Storage, Inc. – Investigation of Operations and Practices, assigned September 16, at Phoenix, Ariz., canceled and reassigned December 2 (2 days), at Phoenix, Ariz.

RAIL, CHANGES IN ASSIGNMENTS

AB-33, Sub. 9, Union Pacific Railroad Co. Abandonment Between Arnold and Stapleton, Neb. in Custer and Logan Counties, Neb., assigned November 1, at North Platte, Neb., postponed to December 8 (1 week), at North Platte, Neb.

AB-98, Sub. 1, Claremont & Concord Railway Co., Inc., Abandonment Between Claremont and Newport in Sullivan County, N.H., assigned September 8, at Newport, N.H., will be held in Newport Town Hall, Sunapee St., before Law Judge Browning.

MOTOR – NEW ASSIGNMENTS

September 14 (4 days) – St. Paul, Minn. – Court Room #2, Fed. Bldg. & U.S. Ct. Hse., 316 Robert St. – Jt. Bd. 142:
MC-127812, Sub. 21, – Tyson Truck Lines, Inc., New Brighton, Minn.

October 13 (1 day) – Birmingham, Ala.:
MC-126305, Subs. 13, 14, 22, 24, 25, 28, 29, 30, 31, 37, 39 and 40 – Boyd Brothers Transportation Co., Inc., Clayton, Ala.

October 13 (8 days) – St. Louis, Mo. – Court Room 3, 5th Floor, 1114 Market St.:
MC-75320, Sub. 186 – Campbell Sixty-Six Express, Inc., Springfield, Mo. Directly related to MC-F-12713, Campbell Sixty-Six Express, Inc. – Purchase (Portion) – Transamerican Freight Lines, Inc.

November 1 (1 day) – Omaha, Neb.:
MC-136786, Sub. 91 – Robco Transportation, Inc., New Brighton, Minn.

November 2 (1 day) – New York, N.Y.:
MC-116763, Sub. 342 – Carl Subler Trucking, Inc., Versailles, O.

November 2 (3 days) – Omaha, Neb.:
MC-108207, Sub. 435 – Frozen Food Express, Dallas, Tex.

November 3 – Washington, D.C.:
MC-2359, Sub. 23 – Dameo, Inc., Somerville, N.J.
MC-124839, Sub. 27 – Building Transport, Inc.

November 4 – Washington, D.C.:
MC-126276, Sub. 148 – Fast Motor Service, Inc., Brookfield, Ill.
MC-128592, Sub. 7 – KLM, Inc., Jackson, Miss.
MC-136964, Sub. 1 – Williams-Milton Bus Co., Woodford, Va.

November 8 – Washington, D.C.:
MC-19227, Sub. 228 – Leonard Bros. Trucking Co., Inc., Miami, Fla.

November 11 – Washington, D.C.:
MC-107295, Sub. 813 – Pre-Fab Transit Co., Farmer City, Ill.

November 12 (1 day) – Columbus, O.:
MC-105566, Sub. 121 – Sam Tanksley Trucking, Inc., Cape Girardeau, Mo.

November 15 (3 days) – New York, N.Y.:
MC-117831, Sub. 4 – S. Siskind & Sons, Inc., Bronx, N.Y.

November 16 (7 days) – Atlanta, Ga. – Fed. Bldg., Interagency Conference Room 556, 275 Peachtree St. N.E. – Law Judge Alprin:
MC-105681, Sub. 50 – M. R. & R. Trucking Co., Crestview, Fla.
MC-109533, Sub. 67 – Overnite Transportation Co., Richmond, Va.
MC-113528, Sub. 26 – Mercury Freight Lines, Inc., Mobile, Ala.

November 29 (1 week) – Boise, Ida. – Jt. Bd. 109:
MC-1924, Sub. 11 – Wallace Colville Motor Freight, Inc., Spokane, Wash.

November 30 (1 day) – Louisville, Ky.:
MC-126879, Sub. 96 – Usher Transport, Inc., Paducah, Ky.

November 30 (1 day) – Omaha, Neb.:
MC-115730, Sub. 14 – The Mickow Corp., Des Moines, Ia.

November 30 (2 days) – San Francisco, Calif.
MC-129387, Sub. 22 – Bill Payne Trucking Co., Huron, S.D.

December 1 (1 day) – Louisville, Ky.:
MC-141832 – K.I.F. Motor Express, Inc., Louisville, Ky.

December 1 (3 days) – Omaha, Neb.:
MC-114211, Sub. 257 – Warren Transport, Inc., Waterloo, Ia.

December 2 (2 days) – Louisville, Ky.:
MC-118959, Sub. 134 – Jerry Lipps, Inc., Cape Girardeau, Mo.

December 2 (2 days) – San Francisco, Calif.:
MC-135274, Sub. 29 – Shippers Best Express, Inc., Salt Lake City, Utah.

December 2 – Washington, D.C.:
MC-113855, Sub. 347 – International Transport, Inc., Rochester, Minn.

December 6 (1 week) – Cincinnati, O.:
MC-F-12739 – Wilson Freight Co. – Purchase (Portion) – Red Star Express Lines.
MC-13123, Sub. 82 – Wilson Freight Co., Cincinnati, O.

December 6 (1 day) – New York, N.Y.:
MC-141701 – D & P Trucking, Inc., South Kearny, N.J.

December 6 (1 week) – San Francisco, Calif.:
MC-129032, Sub. 19 – Tom Inman Trucking, Inc., Tulsa, Okla.

December 7 (2 days) – New York, N.Y.:
MC-135664, Sub. 19 – Bass Transportation Co., Inc., Flemington, N.J.

December 13 (2 days) – Seattle, Wash.:
MC-135013, Sub. 28 – Refrigerated Foods, Inc., Denver, Colo.

December 15 (3 days) – Seattle, Wash.:
MC-114730, Sub. 4 – Van Dyke Truck Lines, Seattle, Wash.

State Commission News

Railroads in Wyoming Win 2.5% Rate Increase

The Public Service Commission of Wyoming has authorized a 2.5 per cent increase in railroad intrastate freight rates and charges corresponding to a like increase in rates applicable to interstate traffic allowed by the Interstate Commerce Commission in Ex Parte No. 313, effective October 11, 1975.

The 2.5 per cent, granted in freight rate docket No. R-21 (Sub. 1), is in addition to a 5 per cent increase granted by the PSC in No. R-20 on November 13, 1975.

The PSC found that the railroads have incurred a system 5 per cent general wage increase and additional increased payroll taxes since the order in No. R-20. Those increased costs, it added, including increases in the railroads' payment of employe health and welfare benefits, have not been considered in previous intrastate ex parte increases.

The 2.5 per cent increase was approved on not less than 30 days' notice from August 13.

HANDY GLOSSARY

. . . of traffic terms. A convenient desktop reference to hundreds of terms and expressions used in daily routine of the traffic department. $2.50 each. Write: Book Division, The Traffic Service Corp., Washington Building, Washington, D.C. 20005

Sept 16, '75

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To whom it may concern;

We the undersigned employee creditors favor the appointment of a receiver to replace the present trustee. We want someone who will keep accurate records and protect our claims, who is not anxious to sell the Company to the Australians, who will try and preserve the operating authorities and restore an Express Company.

Louis Barci 1538 W. WRIGHTWOOD CHICAGO. ILL 60614
Wm Enfield 3725 N. Wilton Chgo. 60613
Poppas 111 So Wanton D.R. Palatine Ill
Mackie 2426 N Kedzie Chicago Ill.
A. Fisher 966 Sawyer Ave Elmhurst ILL.
J King 6035 So Moody Chicago, Ill
J Mc Hugh 4638 So SAWYER AVE CHICAGO
Frank Sopka 5416 Lockwood Chicago Ill.
Louis 2611 Magnolia Av
Nelsonni 4302 S. Keeler
C Nowak 6721 W. 65 CHICAGO. ILL
Edward K Mazgynski 7337 So. Campbell ave.
Jim Anastasiou 7306 S. Mozart St. Chgo.
Jerry Connelly jr 1625 E 92nd St Chgo Ill.
Louis C Gallagher 300 W. 106th Place Chgo Ill.
Joseph J. Gill Jr. 5031 S. Justice Chicago. Ill.
Thomas J. Lorman 1623 So. 49th Ct.
Tom Haibar 5144 S. Throop.
M. Johnson 9316 Indiana Ave. Chgo.
Jimmie Jones 4341 So. Emerald Ave Chicago Ill
Lisiuk 4834 S. Throop. Chicago
Kerrigan 9924 S. Oakley Chicago Ill
Edward L. Nikolski 5401 S. Narragansett
Bert Krebs 4536 W 77th Place Chicago Ill
Lionel D. LAFLEUR 7049 S. Walcott CHICAGO.

Sept 16, [illegible]

66

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[illegible] - 3822 7/8 Kimball Chicago, ILL.

[illegible] Quane 1765 Hillcrest Dr. Country Club Hills Ill

[illegible] P Czub 3745 W. North Chgo. Ill. 60647

[illegible] A Repsumer 530 W. Diversey Chgo. 60614

[illegible] G Pp 3527½ N Broadway Chicago, Ill. 60657

[illegible] Walsh [illegible] St Ydm Chgo Ill 60626

[illegible] A. Schaffer 6165 No. Winthrop Chicago Ill 60660

[illegible] Macholz 4925 Knight Norridge Ill. 60650

[illegible] Carroll 208 Burlington Riverside, Ill.

[illegible] Pritchett 243 Archer Bolingbrook Ill

[illegible] D. Schultz 2640 So. Sawyer Ave Chicago, Ill

[illegible] I. Nelson 5734 N. Winthrop Chicago Ill.

[illegible] [illegible] Mayfield

[illegible] William Haggarty 611 St. Albans

[illegible] B. Frazier 4105 N Oketo

[illegible] Reuter 4011 N Mozart Chicago Ill.

[illegible] D. Lehner 7719 W Chase Chicago Ill

[illegible] Beucher 3723 N Kansas city

[illegible] 3449 N. Hildare Ave Chicago Ill

[illegible] Carlos 3851 N Sayre Chgo.

[illegible] F. Foutris 2628 W. Argyle Chicago. Ill.

[illegible] Irwin 5241 N Hoyne Ave Chgo.

[illegible] [illegible] 3726 W Diversey "

[illegible] [illegible] Merge Chicago

67

TO WHOM IT MAY CONCERN:

We the undersigned employe creditors favor the appointment of a receiver to replace the present REA trustee.

We want someone to keep accurate records and to protect our claims, who is not anxious to sell to the Australians, who will try to preserve the operating authorities and restore an Express Company.

Josephine Dixon 2228 Broadway St. New Orleans, La.
Jane Lilley [illegible]
Claire Baker 1201 Kent Ave Metairie La 70001
Elizabeth Lemann 4525 Equitum Metairie LA
J. Benit 1244 Congress NO, LOUISIANA
C.E. Kirsch 201 Carrollton Ave. Metairie LA
C.A. Miller 3840 Lurline Blvd NO LA
Dolores Nocera 1624 Carondelet New Orleans
Ralph Wilcox 323 Kings Dr. Chalmette, LA
[illegible] 233 Wilma [illegible] 70122
Jane Williams Jr 1205 William Metairie, LA
Ann Corbin 4121 Bayou Chalmette Louisiana
Wm C Corbin 19 Spanish Trail New Orleans La
[illegible] 7417 Hillcrest St LA
Thomas J. Dynan 607 Rose NOLA
N.A. Kirk - 719 Hammond D. Metairie La.
Carl Kirk - 4017 Jacob. New Orleans La
Lee Lorette - 2428 Walmain Houma La.
Warren Burke 412 Colleen -- Metairie Louisiana 70118
H. Lorraine 311 Idola Houma, LA
Lynn Curtis [illegible] New Orleans 70119
Edna Wolfe 711 Whitney Street - New Orleans
Nick Mangone 501 Howard Ave Metairie Louisiana 70003

Dated: September 16, 1976

68

TO WHOM IT MAY CONCERN:

We the undersigned employe creditors favor the appointment of a receiver to replace the present REA trustee.

We want someone to keep accurate records and to protect our claims, who is not anxious to sell to the Australians, who will try to preserve the operating authorities and restore an Express Company.

James Dickey - 94 Dorian Dr. New Iberia La
[illegible] 329 St Maurice St New Orleans La 70117
[illegible] 1617 Dreux St New Orleans La
[illegible] Blanco
[illegible] 7057
Jim Ratts - 253 60th St Metairie
Edward P Rapp Jr 328 Athletic Club New Orleans
[illegible]
Louise C Thornton - Acct. of Mrs. Mateyka.
2 26 Veterans 153 blvd New Orleans La. 70114
[illegible]
Frank Ramage - 1100 Jeff Dr. E. New Orleans
[illegible]
C McDonald - 4424 Canal St New Orleans
John [illegible]
Lane Hardy - 1805 Lavine St New Iberia Louisiana 70563
Dr. E. Stuman 464 Magazine St New Orleans
Conner Bldg - 201 Bank St Morgan City LA
[illegible] PO Box 4124 New Orleans La 70178
Mike Pitre - 513 Clearview Lane Metairie La.
[illegible] West - 3119 Connecticut Kenner La.

Dated: September 16, 1976

69

TO WHOM IT MAY CONCERN:

We the undersigned employe creditors favor the appointment of a receiver to replace the present REA trustee.

We want someone to keep accurate records and to protect our claims, who is not anxious to sell to the Australians, who will try to preserve the operating authorities and restore an Express Company.

Dewey Hebert 331 26th St New Orleans

Murdis Eck 625 2nd St New Orleans, LA

Jerry Lamps 112 Mirbody New Orleans

Lois Wiltz Jr. 4433 Cadiz St New Orleans

East Mines 3135 Madeline Avon Rouge La.

Hoke [illegible] 1500 Bermuda Ct Metairie, LA

James Ligon 4734 Howard NOLA 70125

Allen Gordon 6114 N Prieur St New Orleans

W.A. Stanton 216 Eisenhower Metairie, LA

[illegible] 509 Emmons Houston 14 77023

[illegible]

Dawn Hardy Jr 1051 Bonnie - New Orleans

Dated: September 16, 1976

70

TO WHOM IT MAY CONCERN:

We the undersigned employe creditors favor the appointment of a receiver to replace the present REA trustee.

We want someone to keep accurate records and to protect our claims, who is not anxious to sell to the Australians, who will try to preserve the operating authorities and restore an Express Company.

[illegible] 70125
Earl Gideon 1631 Elysian Fields Ave.
Adam Kirchmeier 214 Willow New Orleans
[illegible] 829 Pres. Dr. [illegible] Louisiana
E. D. Stutes [illegible] Hospital St. Rt. 2
[illegible] 70065
Willie Talbot — — Baton Rouge Louisiana
Frank Boudreaux 5753 Wilson Boulevard 70122
Chuck Pete 2875 Calumet Baton Rouge, LA
Jim Gardner 101 Cardone Lafayette, LA
[illegible]
David Lyons RFD Box 66 Scott, LA
[illegible]
William McDonald 120 N. 4th Bogalusa, Louisiana
Cliff Barnes 4561 Mandeville New Orleans 70127
John Lemmler Baton Rouge Louisiana
Robert Mabry 2624 Orleans St. New Orleans 70119
L. K. Patton 3234 Scholle Road Luling, LA
[illegible]
Harry Hayes 2521 Legislature St. New Orleans 70119

Dated: September 16, 1976

September 21, 1976

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To whom it may concern:

We the undersigned employe/creditors favor the appointment of a receiver to replace the present Trustee. We need someone who will keep accurate records and protect our claims, who is not committed to selling the company to an Australian company, who will attempt to preserve the operating authorities and keep the company operating.

NAME	ADDRESS
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]

Paul S
Patricia

9/22/76

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

In the Matter of	:	Bankruptcy Numbers
REA HOLDING CORPORATION	:	75-B-0251
THE EXPRESS COMPANY, INC.		75-B-0252
REA EXPRESS, INC., f/k/a Railway Express Agency, Inc.	:	75-B-0253
REXCO SUPPLY CORPORATION,	:	75-B-0254
Bankrupts.	:	ORDER TO SHOW CAUSE

- -x

Upon the application of certain former employees who are creditors of the bankrupt estate herein, as set forth in the annexed application, and no adverse interest having been represented and sufficient cause appearing therefor, it is

ORDERED, that the Trustee and his counsel herein show cause before ~~the undersigned~~ Lloyd F. MacMahon District Judge, at the United States Courthouse, Southern District of New York, on forthwith 23rd day of September, 1976 at ~~10:00~~ o'clock A.M., in Room ~~[illegible]~~ or as soon thereafter as counsel can be heard, why the application for the appointment of a receiver should not be granted, and it is further

ORDERED, that cause be shown why said receiver should not be specifically empowered (1) to conduct the business of the bankrupt and take charge of its property, (2) to afford representation to the estate in pending administrative proceedings concerning the bankrupt's authority to continue operations, (3) to submit such proposed orders modifying the stay as he may deem necessary or desirable in order to assure continuing operations and otherwise facilitate an orderly transition in the event that the Chapter X petition now pending herein on appeal is accepted for filing, (4) to report to this Court his findings and recom-

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mendations concerning the progress of the bankrupt estate to date in identifying the various classes of creditors, types of claims, and adequacy of proof, and (5) to report his recommendations for the analysis of reliable relevant data, and establishment of suitable data processing and retrieval techniques, so that inter alia information may be transmitted to creditors on a continuing basis concerning material events in the administration of the estate, and meaningful participation of creditors in the affairs of the bankrupt may be facilitated; and otherwise assisting in the administration of the estate; and it is further

ORDERED, that cause be shown why any requirement of a bond to be furnished by applicants should not be waived, or made nominal in amount; and it is further

ORDERED, that the Trustee herein and his counsel shall serve upon the attorneys for applicants and file any response which they desire to make to this application at least two (2) full days before the date set above for the hearing herein, including without limitation such proposed interim orders or other arrangements as they deem desirable or prudent in the interest of the bankrupt estate to provide for the transition in the event that said Chapter X petition is accepted for filing; and it is further

ORDERED, that service of a true copy of this Order to Show Cause upon the Trustee and his counsel, if made by 1:00 o'clock P. M., on the 22nd of September, 1976, shall be deemed sufficient notice of this proceeding, considering all of the circumstances.

Dated: New York, New York
September 22, 1976

/s/ Tuttle Pollack
District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In the Matter of:	Bankruptcy Numbers
REA HOLDING CORPORATION	75-B-0251
THE EXPRESS COMPANY, INC.	75-B-0252
REA EXPRESS, INC., f/k/a Railway Express Agency, Inc.	75-B-0253
REXCO SUPPLY CORPORATION.	75-B-0254
	(J.J.G.)
Bankrupts.	

Petition Under Chapter X.

1. This petition under Chapter X of the Bankruptcy Act is respectfully submitted pursuant to Bankruptcy Official Form 10-2 and Bankruptcy Rule 10-105 which specifically states that such a petition may be filed after adjudication.

Petitioners are:

Name	Address	Amount
s/ Anthony Satriano	4701 Cottage Ave. No. Bergen, N.J. 07047	$2,310.
s/ Daniel S. Gilhuly	109 Jones Street Westhaven, Ct.	2,164.
s/ Vincent Pontillo	2239 Troy Ave. Brooklyn, N.Y. 11234	2,310.
s/ Matthew E. Manning	51-34 30th Ave. Woodside, N.Y. 11377	2,400.
s/ William R. Wegl	21-29 150th St. Whitestone, N.Y. 11357	2,210.
s/ Edmund F. Novitski	2185 Valentine Ave. New York, N.Y. 10457	2,210.
s/ Edward J. Cox	279 7th St. Jersey City, N.J. 07302	2,210.
s/ Anthony J. Januzzi	219 Summit Ave. Jersey City, N.J. 07304	2,210.
s/ Charles F. McGovern	136 Jefferson Ave. Brooklyn, N.Y. 11216	2,310.
s/ James J. Kilcoyne	316 West Shore Dr. Sparta, N.J. 07871	2,310.

The foregoing petitioners are creditors of REA Express, Inc., a bankrupt, debtor, having claims against debtor, liquidated as to amount and not contingent as to liability, aggregating in the amount to $5,000.00 or over. The nature and amount of petitioners' claims are as follows: vacation pay liability accrued prior to February 18, 1975 in the amount set by each petitioner's name above. In addition, petitioners claim amounts due for wages and benefits following the filing of the petition under Chapter XI on February 18, 1975.

2. The debtor is a corporation organized and existing under the laws of Delaware and is subject to an involuntary petition under Chapter X of the Bankruptcy Act.

3. The debtor has had its principal place of business within the district for the preceding six months.

4. The debtor is insolvent or unable to pay its debts as they mature.

5. The nature of the debtor's business is express transportation throughout the United States.

6. The indebtedness of the debtor liquidated as to amount and not contingent as to liability is greatly in excess of $250,000.

7. The assets, liabilities, capital stock, and financial condition of debtor are substantially as set forth herein in the petition under Chapter XI dated February 18, 1975, which is hereby incorporated by reference, as supplemented by the record herein and particularly the testimony of Price Waterhouse & Company, independent accountants, at the time of the debtor's adjudication on November 6, 1975, all of which is also incorporated herein by reference.

8. The pending proceedings affecting the property of the debtor are presently pending herein as a part of the adjudication.

9. No plan of reorganization, readjustment, or liquidation affecting the property of the debtor is pending either in connection with or without any judicial proceeding except as in this proceeding. No other petition by or against the debtor is pending under Chapter X of the Act; nor is any other bankruptcy case, initiated by a petition by or against the debtor now pending other than in this present proceeding.

10. The specific facts showing the need for relief under Chapter X of the Act are as follows: Mr. F. Ralph Nogg has testified that the express business can be reorganized and the creditors paid substantial amounts through reorganization under Chapter X. Mr. Nogg's testimony is incorporated herein by reference. Mr. Nogg has further said that the debtor's transportation rights, which may be among its most valuable assets, are in jeopardy of being lost, in his opinion, if this reorganization is not conducted under Chapter X. Chapter XI relief would not be adequate because it has heretofore been tried and failed. Further, relief under Chapter X is needed in order that an independent trustee may be selected who is knowledgeable about transportation matters and who is an operating trustee rather than a liquidating trustee. Further, relief under Chapter X is essential so that the creditors can be organized and heard with respect to the presentation of plans for reorganization.

11. A trustee, C. Orvis Sowerwine, has been appointed for or has taken charge of all or the greater portion of the property of the debtor in this pending action as the record herein shows.

12. The prescribed filing fee is tendered herewith. (Please ascertain amount from Clerk.)

WHEREFORE petitioners pray for relief in accordance with Chapter X of the Act.

Signed: Anthony Satriano

Address: 4701 Cottage Ave.
No. Bergen, N. J. 07047

Signed: Daniel S. Gilhuly

Address: 109 Jones Street
Westhaven, Ct.

Signed: Vincent Pontillo

Address: 2239 Troy Ave.
Brooklyn, N.Y. 11234

Signed: Matthew E. Manning

Address: 51-34 30th Ave.
Woodside, N.Y. 11377

Signed: William R. Wegl

Address: 21-39 150th St.
Whitestone, N.Y. 11357

Signed: Edmund F. Novitski

Address: 2185 Valentine Ave.
New York, N. Y. 10457

Signed: Edward J. Cox

Address: 279 7th St.
Jersey City, N.J. 07302

Signed: Anthony J. Januzzi

Address: 219 Summit Ave.
Jersey City, N.J. 07304

78.

Signed: Charles F. McGovern

Address: 136 Jefferson Ave.
Brooklyn, N.Y. 11216

Signed: James J. Kilcoyne

Address: 316 West Shore Dr.
Sparta, N.J. 07871

STATE OF NEW YORK)
) ss.
COUNTY OF NEW YORK)

I, DANIEL S. GILHULY , one of the petitioners named in the foregoing petition do hereby swear that the statements contained therein are true according to the best of my knowledge, information, and belief.

s/ Daniel S. Gilhuly,
Petitioner

Subscribed and sworn to before
me this 23rd day of June 1976:

s/ Frank T. Alessi
Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of		
REA HOLDING CORPORATION,	:	75-B-251
THE EXPRESS COMPANY, INC.,	:	75-B-252
REA EXPRESS, INC., f/k/a Railway Express Agency, Inc.,	:	75-B-253
REXCO SUPPLY CORPORATION,	:	75-B-254
Bankrupts.	:	IN PROCEEDING FOR THE REORGANIZATION OF CORPORATIONS

ANSWER OF DEBTOR

TO THE HONORABLE LLOYD F. MacMAHON
JUDGE OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REA Holding Corporation, The Express Company, Inc., REA Express, Inc. and REXCO Supply Corporation, the above-named debtors, answer the petition filed against them requesting proceedings be had under Chapter X of the Bankruptcy Act as follows:

1. Admit the allegations contained in paragraphs numbered "2", "3", "4", and "6" of said petition.

2. Deny knowledge or information sufficient to form a belief with respect to the truth of the allegations contained in paragraphs "1" and "12" of the petition.

3. Deny each and every allegation contained in paragraph "5" of the petition, but admit that prior to adjudication in bankruptcy on November 6, 1975, REA Express, Inc. was engaged in the business of surface and air express shipments throughout the United States under the regulatory jurisdiction of the Interstate Commerce Commission and the Civil Aeronautics Board.

4. Deny each and every allegation contained in paragraphs "8", "9", and "11" of the petition, but admit on November

6, 1975 the above-named debtors were adjudicated bankrupt by orders of the Bankruptcy Court, and, that on November 7, 1975, C. Orvis Sowerwine, duly qualified as Trustee by filing his bond. It is further admitted that bankruptcy proceedings are currently pending, and that no other petition by or against the debtors under Chapter X of the Bankruptcy Act is pending.

5. Deny each and every allegation contained in paragraphs "7" and "10" of the petition, but admit that Price Waterhouse & Company testified before the Bankruptcy Court on November 5, 1975.

6. Deny each and every other allegation contained in said petition.

FIRST AFFIRMATIVE DEFENSE

7. Allege that the petition has not been filed in good faith because there is no reasonable expectation that a reorganization can be effected.

SECOND AFFIRMATIVE DEFENSE

8. Allege that the petition has not been filed in good faith because the interests of the creditors of REA are best served in the bankruptcy proceeding currently pending before Judge Galgay.

THIRD AFFIRMATIVE DEFENSE

9. Allege that the petition has not been filed in good faith because the petitioning creditors have not filed the petition in good faith under general equity principles.

WHEREFORE, the above-named debtors respectfully request

that said petition be dismissed with costs.

By A.E. Larsen, an officer of the Debtors

A.E. Larsen

Sworn to before me this

21th day of September, 1976

Donald L. Wallace

Notary Public

DONALD L. WALLACE
Notary Public, State of New York
No. 31-0[illegible]75
Qualified in New York County
Commission Expires March 30, 1978

Arthur Olick, Attorney for Debtors
Anderson, Russell, Kill & Olick
630 Fifth Avenue
New York, N.Y.

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STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

☐ Certification By Attorney certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's Affirmation shows: deponent is the attorney(s) of record for in the within action: deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

Check Applicable Box

☐ Individual Verification being duly sworn, deposes and says: deponent is the in the within action: deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

☐ Corporate Verification the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at

Check Applicable Box

☐ Affidavit of Service By Mail On 19 deponent served the within upon attorney(s) for in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service On 19 at deponent served the within upon herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on 19

.....
The name signed must be printed beneath

NOTICE OF ENTRY

Please take notice that the within is a *(certified)* true copy of a duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,
ANDERSON RUSSELL KILL & OLICK, P.C.

Office and Post Office Address
630 Fifth Avenue
NEW YORK, NEW YORK 10020

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19
at M.
Dated,

Yours, etc.,
ANDERSON RUSSELL KILL & OLICK, P.C.

Attorneys for

Office and Post Office Address
630 Fifth Avenue
NEW YORK, NEW YORK 10020

To

75-B-231
75-B-232
Index No. 75-B-233 Year 19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of

KMA HOLDING CORPORATION
THE EMPRESS COMPANY, INC.,
KMA EXPRESS, INC., f/k/a
Railway Express Agency, Inc.,
RENCO SUPPLY CORPORATION,

Bankrupts.

IN PROCEEDING FOR THE RE-ORGANIZATION OF CORPORATIONS

ANSWER OF DEBTOR

ANDERSON RUSSELL KILL & OLICK, P.C.

Attorneys for Debtor

Office and Post Office Address, Telephone
630 Fifth Avenue
NEW YORK, NEW YORK 10020
(212) 397-9700

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

.....

Attorney(s) for

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

In the Matter

of

REA EXPRESS INC., ET AL.,

Bankrupt

No. 75 B 253

New York, New York

September 27, 1976

HEARING ON REMAND FROM HON. LLOYD F. McMAHON, RE: CHAPTER X PETITION (GOOD FAITH FILING, APPOINTMENT OF RECEIVER) VACATING OF AUTOMATIC STAYS

HEARING ON APPLICATION FOR ALLOWANCES

B E F O R E:

HON. JOHN J. GALGAY,

Bankruptcy Judge

RAYVID REPORTING SERVICE
CERTIFIED STENOTYPE REPORTERS
150 NASSAU STREET
NEW YORK, N. Y. 10038

CORTLANDT 7-3877
3878

A P P E A R A N C E S:

MESSRS. ANDERSON, RUSSELL, KILL & OLICK, P.C.
Attorneys for Bankrupt
630 Fifth Avenue
New York, New York
BY: ARTHUR OLICK, ESQ., Of Counsel

MESSRS. MARCUS & ANGEL
Attorneys for Trustee
60 East 56th Street
New York, New York
BY: JOSHUA J. ANGEL, ESQ., Of Counsel

MESSRS. HOLTZMANN, WISE & SHEPARD
Attorneys for Allen & Company
30 Broad Street
New York, New York
BY: JAMES W. DEER, ESQ., Of Counsel

MESSRS. WHITMAN & RANSOM
Attorneys for Trustee
522 Fifth Avenue
New York, New York
BY: DONALD WALLACE, ESQ., Of Counsel
-and-
WILLIAM M. KAHN, ESQ., Of Counsel
-and-
JOEL GOLDBLUM, ESQ., Of Counsel

MESSRS. WISEHART, FRIOU & KOCH
Attorneys for Reameco, Inc.
150 East 42nd Street
New York, New York
BY: ARTHUR WISEHART, ESQ., Of Counsel
-and-
ROBERT E. FRIOU, ESQ., Of Counsel

- - - - - -

A L S O P R E S E N T:

F. Ralph Nogg
Witness for Reameco, Inc.
Minneapolis, Minnesota

ORVIS SOWERWINE,
Trustee

- - - - - -

P R O C E E D I N G S

MR. ANGEL: If Your Honor please, originally today's time slot was going to be on a hearing on applications for interim allowances pursuant to a notice dated August 12, 1976.

However, as a result of recent developments in the case which the Court is aware of and which will come out in this hearing today, the Trustee requests that this hearing on interim allowances be adjourned to the first available date of this Court and that we then proceed to the issue at hand, which is the problems arising from the filing of a Chapter X Petition.

THE JUDGE: Is that agreeable to all the parties interested in the application for allowances?

MR. WISEHART: Yes, Your Honor, at least speaking on behalf of my firm.

THE JUDGE: Are there any other observations?

(No response.)

THE JUDGE: There is no objection, I gather.

MR. ANGEL: No. The Court might notice that we notice that there is a representative here of Price, Waterhouse, there are representatives of Anderson, Russell, Kill & Olick, Mr. Olick, so I think the major applicants are here; the Trustee is here, so there should be no problem.

THE JUDGE: And the employees who are creditors. I hear no objection to putting it over for one week.

Let's put it over to October 5th at 2:15.

MR. ANGEL: That would be fine.

THE JUDGE: There would be no necessity for republishing or renoticing.

MR. ANGEL: That is correct, that is a very expensive procedure.

THE JUDGE: All right, now the

purpose of this hearing is as a result of a hearing before Judge McMahon that went on this morning at 10:00 o'clock.

MR. KAHN: That is correct, Your Honor. Your Honor may recall that during the course of the hearing on the Trustee's application authorizing him to sell the operating rights to All-Trans U.S.A., that during the course of that hearing Mr. Wisehart on behalf of certain Petitioners offered to the Court as an Exhibit an original Chapter X Petition.

The Court quite properly ruled that the issue of the validity of the Chapter X Petition was not before it - -

MR. WISEHART: Your Honor - -

THE JUDGE: Let him finish, give him a chance.

MR. KAHN: (Continuing) - - was not properly before it because the Petitioning Creditors had neither delivered the original Petition to the Clerk of the Court as expressly required by the local Rules, nor had the Petitioning Creditors paid the filing fee.

Now, Your Honor, I would like to offer this afternoon a letter from Mr. Wisehart addressed to the Clerk of the Court - -

MR. WISEHART: Your Honor, may I be heard?

THE JUDGE: Mr. Wisehart, please, let's do it - - let's do this in an orderly way.

I am not going to deny your opportunity to be heard, but give him a chance.

MR. WISEHART: I can only - -

THE JUDGE: I am listening to Mr. Kahn.

I will give you an immediate opportunity as soon as I feel that he is finished.

Go ahead.

MR. KAHN: A letter dated September 7, 1976 from the firm of Wisehart, Priou & Koch, signed by Arthur Wisehart, addressed to the Clerk of the United States District Court, which I will read sentence one, "Enclosed herewith is a certified check in the amount of $70.00 to cover the fee for filing a Petition

under Chapter X of the Bankruptcy Act".

The letter says many more things Your Honor, but the important date is that no fee was paid to the Clerk until September 7, 1976.

Consequently, the Chapter X Petition under the express provisions of the Bankruptcy Act, namely, Section 132, that Chapter X Petition was never filed.

After that Petition was filed - - I would now like to offer it In Evidence.

THE JUDGE: Don't offer anything at the moment. I just treat this as an opening comment so that the Court can focus on what the issue is.

MR. KAHN: All right, Judge. After the Chapter X had been filed on September 7th, the information to that effect was given to Judge Worker, before whom the Reameco appeal was pending.

Judge Worker then sent a note back to the Clerk returning the Appellate file upon the ground that once the Chapter X

"Apparently" had been filed, that therefore all matters were stayed.

Consequently, he was in no position, had no jurisdiction indeed to further decide the appeal, so the matter went back to the Clerk.

After that time, to make a very long story relatively short, the matter - - an additional Petition was filed with the Clerk by Mr. Wisehart, a duplicate original, I am given to understand, at the express direction of Judge Milton Pollack.

Mr. Wisehart had apparently refused to file the duplicate original, even now the stay was now pending and there was no Chapter X Proceeding, so that the entire administration was in a state of disarray and chaos.

Finally, Judge Pollack ordered Mr. Wisehart to file that Chapter X Petition.

Once that was filed, the Chapter X Petition was referred to Judge McMahon.

THE JUDGE: What was the date when Mr. Wisehart complied with Judge Pollack's

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Order?

MR. WISEHART: There was no such Order, Your Honor.

MR. KAHN: It was an oral Order and Mr. Angel was present.

MR. WISEHART: It was not an oral Order and Mr. Kahn I do not believe was present.

THE JUDGE: Let me ask - -

MR. ANGEL: I was present, Your Honor.

THE JUDGE: Let me ask the questions. When is it uncontroverted that a Chapter X Petition was duly filed?

MR. ANGEL: September 22nd, Your Honor.

MR. WISEHART: You asked for when it was uncontroverted.

As so many things in life, this is one of the things that cannot be said to be uncontroverted because this was offered for filing in the Reameco hearing, Your Honor.

THE JUDGE: I am well aware of that.

MR. WISEHART: Under Section 509C, which does apply to a Bankrupt in Adjudication, even if it were determined that this was the wrong place to offer it, although as Your Honor knows, we feel very strongly that under the Supreme Court Rules, this was the right place.

THE JUDGE: But Mr. Wisehart, my real question - -

MR. WISEHART: The point is under 509C - -

THE JUDGE: When I am asking a question, you should stop talking.

MR. WISEHART: I hadn't finished responding to your prior question.

THE JUDGE: You have now. Let me ask the question.

On September 22nd, you did file a Petition, an involuntary Petition for a Chapter X and the filing fee was applied.

So from that point on, there can't be any dispute that there was at least a valid filing.

Isn't that so?

MR. WISEHART: Yes, from that point on there is no question that there was a valid filing.

Our position is that the valid filing relates back to the date of original submission.

That's where you get into the controversy, because we did tender the fee and we did offer the Petition and the matter - -

THE JUDGE: All right, I will give you an opportunity to argue those points after Mr. Kahn finishes.

MR. WISEHART: I just want to make sure that the record is clear because there is a tendency to make statements that may be disputed.

THE JUDGE: All right, now, let Mr. Kahn finish his statement.

MR. KAHN: Simultaneously, Your Honor, the Wisehart firm obtained an Order to Show Cause signed by Judge Pollack and returnable before Judge McMahon for an Order

why a Receiver should not be appointed.

The Summary of the reasons for the appointment of a Receiver in those papers were that a Chapter X Petition had been filed.

That to make an orderly transition from the bankruptcy into the Chapter X an independent Receiver such as Mr. Ralph Nogg or Mr. Dermott Noonan, an employee of Mr. Wisehart's now, should be appointed Receiver for this orderly transition.

That motion and the Chapter X itself came to be heard before Judge McMahon this morning.

THE JUDGE: I don't recall those names being mentioned in the Order to Show Cause.

MR. KAHN: No, they were mentioned in the application, Judge.

Now, I have a copy of the application, if Your Honor would like to refresh his recollection.

MR. WISEHART: It is not a fact that Mr. Noonan is an employee of Mr. Wisehart.

MR. KAHN: Judge McMahon stated, I understand, because I was not there, but Mr. Angel reported to me when I came back to New York on Friday morning, that Judge McMahon had directed that all Briefs be filed with him before the close of business on Friday.

Consequently, we all spent until Friday about five o'clock, five-thirty getting our papers out and filing them.

When the Court convened this morning Judge McMahon advised everyone that he had read the Briefs.

Based on his reading of the Briefs, the Petition under Chapter XI was clearly not filed in good faith.

THE JUDGE: You said Chapter XI.

MR. KAHN: I mean Chapter X was clearly not filed in good faith.

Our Brief had indicated that there were three grounds why it could not have been filed in good faith.

One ground was Section 164 (3) which provided that it was unreasonable to

expect that a reorganization could be effected.

Section 163 (4), that the best interests of creditors would be subserved by the continuation of the prior proceeding, the Bankruptcy proceeding and the third ground was that Section 163 expressly provides that the definition of good faith - - Section 146, excuse me, expressly provides the definition of good faith as set forth in sub items one through four is not to be taken as limiting the generality of the use of the word good faith and good faith was to be treated in the general equity sense.

The third ground why this Petition was not filed in good faith was that these Petitioning Creditors were all Petitioning Creditors who had no Chapter XI claims based on the testimony of Mr. Olick and that consequently, this Petition for Chapter X was an attempt by these creditors to take all of the other creditors' money, approximately six million dollars to seven million dollars,

presently in the hands of the Trustee and expend those funds, which rightfully belong to the creditor body, for these creditors who are subordinated under the express provisions of the Bankruptcy Act to the Chapter XI creditors.

That therefore, to put at risk the money of the vast bulk of the creditor body for this small group of Petitioning Creditors and I think the numbers are significant, Your Honor.

The Petitioning Creditors claims aggregate about $22,000. The aggregate claims in the entire bankruptcy proceeding are over $60,000,000, and the unpaid Chapter XI claims, excluding these creditors, approximate twelve million dollars to thirteen million dollars.

So that the Petition in Chapter X is brought by $22,000 worth of creditors who cannot be paid until the $13,000,000 are paid ahead of them.

They are asking that the $7,000,000 presently in the hands of the Trustee and we

would anticipate collections of perhaps another $2,000,000 or $3,000,000 all be used to risk these funds so that in the hopes that a reorganization can be effected.

Those were the three grounds which we urged and which apparently Judge McMahon believed were correct grounds.

He therefore announced that in his opinion the Petition was not filed in good faith.

If the statement of facts set forth in the Trustee's Brief were accurate - - and Your Honor I have read that statement of facts and it certainly is accurate - - he however then decided that he would remand the matter back to Your Honor for a hearing or for a decision, in fact, on the subject as to the accuracy of these facts, because as he said, Your Honor has the best acquaintance with this matter to determine whether or not these facts are accurate.

During the time between Judge McMahon's hearing and this hearing we have

checked the Bankruptcy Act and we find that Section 117 gives Your Honor the right to hear and report generally upon specified matters.

We have also checked the Bankruptcy Rules and we find that in those districts where there is no automatic reference - - and the Southern District is a district where there is no qutomatic reference - - that the matter remains before the District Judge, who may refer matters to any Bankruptcy Judge, may remove matters from a Bankruptcy Judge and may refer them to other Bankruptcy Judges.

From all of this we have concluded that Your Honor's jurisdiction here is to hear and report rather than hear and determine.

We then raised with Judge McMahon the question as to a continuation of the suspension of the automatic stay which is provided both in the Statute and the Rules.

Judge McMahon announced that he was referring that matter back to you in the first instance.

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We have prepared an Order for Your Honor's signature at the conclusion of this hearing.

The stay continues to remain suspended until the conclusion of this matter before Your Honor.

We have prepared an Order which will - -

which we will hand to Your Honor at the conclusion continuing that stay until a determination by Your Honor or by Judge McMahon of this hearing.

That is the reason we are before Your Honor now.

That is the limits of Your Honor's discretion.

THE JUDGE: Let the record indicate that I did receive a telephone call from Judge McMahon before lunch.

What Judge McMahon had to say is consistent with what Mr. Kahn has reported.

In other words, that I am to conduct a hearing and report to him as to what my recommendations are.

I plan to do that just as promptly as possible.

Judge McMahon indicated to me that he has an assignment to hear matters upstate.

It may well be that he will be leaving Thursday or Friday.

This matter would be referred to him one way or the other before that date. In other words, my determination.

MR. WISEHART: Your Honor - -

MR. KAHN: Your Honor, I am not concluded.

THE JUDGE: I think you have. Why don't I hear from Mr. Wisehart.

MR. WISEHART: Your Honor, I would like to state that the matter coming up before Judge McMahon this morning was an Order to Sho- Cause which he signed on Friday - - Wednesday of last week, bringing on both the issue of the filing of the Chapter X Petition and the application by the Petitioners for the appointment of a Receiver.

Now, Mr. Friou and I both appeared

at differing times before Judge McMahon.

We were not told that the papers were due before him on Friday.

Consequently, there appears to have been a misunderstanding on that point and the Order to Show Cause signed by Judge McMahon brought both of the matters which I mentioned on for hearing this morning at 10:30.

We worked around the clock over the weekend to prepare our papers.

It is fair to say that whatever Judge McMahon said this morning was without benefit of the examination of our papers and has to be viewed in that light.

We are ordering a transcript of the record and it will speak for itself undoubtedly.

If Judge McMahon wants to clarify matters, Judge McMahon certainly is capable of doing so.

But our understanding of the situation was that the entire matter involved in our Order to Show Cause was being sent down to Your Honor, including the application for

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the appointment of a Receiver.

Now, had Judge McMahon had the benefit of our papers before he made the statements he did, he would have known that the application for the appointment of a Receiver is being made as an issue that is separable from the Chapter X Petition.

I believe Your Honor has seen that application and it does refer to the facts that we anticipated that the matter before Judge Worker would result in a determination by Judge Worker, who seemed to us to be very clear, that the Chapter X Petition was properly filed.

The reason we filed a duplicate original was because for some reason the Court records here are in such bad shape that the one that was delivered - - that was offered in this case could not be located and that was the reason that was offered at that time.

The filing fee had previously been tendered, as Counsel well knows.

Now, the fact of the matter is that

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while the Order to Show Cause on the appointment of a Receiver was made in anticipation of some such ruling by Judge Worker, it was also made specifically on separable grounds.

Those grounds are stated in the application and it is our understanding of the situation, although again this can be clarified, it certainly is a request, that that application be considered as a part of this hearing.

The stakes, as Your Honor knows, in this bankruptcy are enormous.

Counsel for a Trustee, who is supposed to represent the creditors in this bankruptcy estate, and contends that only $22,000 worth of creditors in interest support these applications is simply out of touch with the creditor feeling in this bankrupt estate.

The fact is, and it is undisputed on the record, that $50,000,000 Proofs of Claim, approximately, have been offered, filed on behalf of these employees, according to the General Counsel of B.R.A.C., $50,000,000.

We believe these are the majority in number and amount.

Now, it is true that we have not had time to go around to all 10,000 employees and we haven't had the money to do it either and ask them.

But one of the purposes of this application for a Receiver and one of the purposes of the Chapter X Petition is to make sure, Your Honor, that the real sentiment of the creditors in this bankrupt estate can at last be measured in some satisfactory way.

THE JUDGE: What does the Statute call for?

MR. WISEHART: Well, the Statute, Your Honor - -

THE JUDGE: Does it say three creditors?

MR. WISEHART: Yes, it does. But I want to add though, there is something else that is important.

It must be considred in this general context.

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That is that there has not been one meeting of creditors since this estate was adjudicated on November 6, 1975.

Now, I pointed that out in the argument to Judge Worker.

Of course, Judge Worker cannot be expected to be familiar with the facts.

He doesn't have the depth of understanding about this that Your Honor does, which is why we brought it to Your Honor originally and this is obviously where it should be.

But there has not been one meeting and in response to that, Mr. Kahn for the Trustee gets up and says, "Well, there have been frequent meetings with an executive committee of creditors".

He tells that to Judge Worker. Of course, the time is limited, so Judge Worker could not know that that Creditors Committee was comprised of the Penn Central Railroad, who has been an aggressive party seeking liquidation of R.E.A. for months and months, one of Mr. Angel's clients and an air-

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line creditor - -

MR. KAHN: Excuse me, Your Honor, I must object on the ground that none of this has anything to do with the - -

THE JUDGE: I am aware of that but I am going to let Mr. Wisehart go on.

MR. WISEHART: A transportation consultant who naturally would be somewhat sensitive to the desires of potential sources of business.

The Bankruptcy Rules require that the first meeting of creditors after adjudication, I think it's Rule Number 204, must be held within ten - - not less than ten or more than thirty days.

Now, Your Honor, we submit that the reason that there has been no meeting of creditors in this bankrupt estate is because the records in the files of the Bankruptcy Court are in such chaotic condition that a meeting of creditors could not possibly be called.

We will have a witness who will so

testify.

We will also have a witness who will testify that of the creditors who have received notices of various things like Mr. Kahn mentioned to Judge Worker, the sale of real estate, or the hearing on the Reaneco proposal, or the All-Trans proposal, we have a witness who will testify that 4,162 creditors, who have filed in the Bankruptcy Court, are names that were never referred to the computer company and the reason given was that the Trustee thought it was too expensive.

Whatever the reason is, the fact is that - -

THE JUDGE: Mr. Wisehart, let's try and z ero in on the question of good faith, if you will.

MR. WISEHART: I am, but I want to say, Your Honor, that I am also speaking on the application for the appointment of a Receiver.

As a preliminary matter on the good faith issue on the Chapter X Petition,

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I move to disqualify the Trustee and his Counsel from participating in that proceeding as I may move under Rule 7 in a hearing of the Federal Rules of Civil Procedure, and the ground on which I make that motion is contained in the appendix which you have received dealing with a conflict of interest question and with the additional factor that the Trustee and his Counsel have a self and personal interest in this matter so that they cannot be relied upon to adequately protect the interests of the creditors because their interest is to perpetuate their positions.

The testimony and the record is clear that the Trustee lacks transportation experience and undoubtedly the change of this procedure to a Chapter X proceeding would result in a change in the administration of the Bankrupt estate.

THE JUDGE: Now, let me again direct your attention to the good faith issue, Mr. Wisehart.

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In my opinion I indicated - - in my opinion on the decision on the assignment of the rights, I indicated that there was a stipulation or an understanding that the record in that hearing would be sufficient to constitute a record on any hearing on the question of good faith of the filing of a Chapter X Petition.

Is that a correct statement?

MR. WISEHART: You in error indicated that, Your Honor, and I want to - - since Your Honor brought this up - -

THE JUDGE: Wait a minute. Is your answer to my question, yes, your opinion contains that, is that all you are answering?

MR. WISEHART: I am saying that finding number six of your opinion so states.

THE JUDGE: Now you are saying that you didn't so stipulate?

MR. WISEHART: That is correct, Your Honor and we did appeal that to Judge Worker.

MR. KAHN: Excuse me, he did not appeal it.

They never filed a notice of appeal. Only Reameco filed it and this is a Petition of the Chapter X creditors.

MR. WISEHART: Your Honor, if we didn't appeal it, and the thing was not filed, your finding is void.

But the fact is that Judge Worker -- the matt er was appealed, it was listed as an issue on appeal.

Judge Worker did not dispose of that issue on appeal because we are now in Chapter X and apparently he was convinced that at least there was something to be said for being in Chapter X.

Now, I first found out that the contention was being made that that was a stipulation in the hearing before Your Honor on the very same day that Your Honor's opinion came out.

It wasn't contended any day before a late filed Brief on behalf of the Trustee.

Within two hours we filed a Brief saying it is not so.

Now, I don't know what the basis was for any such statement that there was a stipulation by us but we respectfully submit that an examination of the record will show that it was not so stipulated.

THE JUDGE: Would you stop for a moment, Mr. Wisehart.

Mr. Kahn, can you point to any portion of the record where such a stipulation is alleged to appear?

MR. KAHN: Not in one moment, Judge, but - -

MR. WISEHART: Your Honor - -

THE JUDGE: I asked one question.

MR. KAHN: We can certainly look for it.

MR. WISEHART: Your Honor, I wanted to say that all portions of the record dealing with that question are set forth in our Memorandum to Judge Worker.

We have quoted from them all and we have also quoted from our Brief bringing to your attention, before you made your de-

cision, that there was no such stipulation.

I think it's extremely unfair for Counsel to be playing with that contention in a case like this, where there has been an issue of conflict of interest raised.

I think that we are entitled to fairer treatment, if I may respectfully say so, Your Honor.

Now, may I submit - -

MR. KAHN: Your Honor - -

MR. WISEHART: May I submit the Brief to Judge Worker?

THE JUDGE: You are not going anyplace but here.

MR. WISEHART: The Brief, you ask where it is in the record. All portions of the record dealing with that discussion are quoted in our Brief to Judge Worker.

MR. FRIOU: That is in the appendix.

THE JUDGE: Will you point to the exhibit in the appendix?

MR. FRIOU: Yes.

THE JUDGE: All you are saying is

you have examined the record and you have found no references other than the ones that appear here?

MR. WISEHART: That is correct.

MR. KAHN: Your Honor, the issue of conflict was never raised by anyone and Judge Worker told Mr. Wisehart at the hearing that he had not raised it because he has still not made a motion to remove the Trustee and he told Mr. Wisehart it is not before him and it is not before any Court.

MR. WISEHART: That is not correct.

THE JUDGE: Let's keep this record as simple as possible.

My question really was whether or not there was any stipulation between the parties that the whole record of the seven days of hearing that I had in connection with the transfer of the rights would be treated by any reviewing Court as the record necessary to determine the good faith issue under a Chapter X proceeding.

MR. KAHN: We will look for it,

Judge, I don't have it with me.

MR. WISEHART: Your Honor, referring to the Exhibits in our appendix, which we have given to you - -

THE JUDGE: But were not available to Judge McMahon.

MR. WISEHART: But were not available to Judge McMahon.

THE JUDGE: Prior to 10:30 this morning.

MR. WISEHART: That is correct. Item Number Five on Page 50 deals with that issue, Your Honor (handing).

If Your Honor will go through that, you will note at the end that we sought to reserve time on the Chapter X issue, which at the conclusion of the hearing Your Honor refused to let us go into.

It was at that time that we wished to make an additional statement on Chapter X.

Would Your Honor like to examine that?

THE JUDGE: Not right now.

MR. WISEHART: Your Honor, we have made our motion to disqualify the Trustee and his Counsel.

MR. KAHN: Excuse me, I have never been served with any motion papers.

MR. WISEHART: No, under Rule 7, in a hearing, we can make a motion orally and it is supported by our application - - I mean our Affidavit, our appendix, which raises the conflict of issue question before you.

THE JUDGE: Well, you are aware that I did authorize a firm by the name of - -

MR. KAHN: Windels & Marks.

THE JUDGE: Windels & Marks to advise the Court as to whether or not on the basis of your statements as to conflict and documents that were made available to them through the Trustee, that they did find there was no such conflict. And so recommended to the Court.

MR. WISEHART: Yes, I would like

to have Mr. Friou speak to that, Your Honor.

MR. KAHN: Excuse me, Your Honor, it is not before the Court.

Because any hearing - - any decision on conflict must be on hearing and notice.

We have no notice whatsoever, we have never had any notice.

We have told Mr. Wisehart since June that if he wanted to write it on, he should bring it on. He hasn't.

Judge Worker had told him he hadn't brought it on, he said, "How can I read all this appendix, about this size, how can I read that on the conflict issue if it's not before me, why don't you make a position motion".

Mr. Wisehart knows that.

MR. WISEHART: He did not say that.

MR. KAHN: He did not make such a motion Your Honor and now I notice for the first time in this Brief, he says, "In support of a motion to disqualify the Trustee",

but he hasn't made any motion to disqualify the Trustee and therefore this whole record should be stricken.

THE JUDGE: Where is the motion?

MR. WISEHART: The motion is being made orally - -

THE JUDGE: Right now?

MR. WISEHART: Right now on the basis of Rule 7B, under the Federal Rules of Civil Procedure, which states, "Application" - -

THE JUDGE: Never mine what it says. I am sure - -

MR.WISEHART: What it says in the course of a hearing you can make a motion orally.

I wish to state - -

THE JUDGE: Mr. Wisehart, your letter is dated - - can anyone fill me in on the date of his original letter?

MR. KAHN: Which, the letter to the Court with the filing fee?

THE JUDGE: May 6, 1976. Today is September 27, 1976. Don't you think you have

had time enough between then and now to make a written motion with respect to conflict?

MR. WISEHART: Of course, Your Honor, but Your Honor specifically said that you were taking the matter under consideration.

Are we supposed to impose upon the Court additional paper work when your own statement is that you have taken the matter under consideration and you don't want to hear anything further about it?

THE JUDGE: This never deterred you before.

MR. WISEHART: Well, we will do it, Your Honor, if you wish, but certainly that's the reason we didn't make it previously.

Furthermore, Your Honor, I want to state again, we are making this motion to disqualify on the appearance of the Chapter X Petition, which is before you now for the first time and under Cinerama, the Second Circuit Court of Appeals considered a matter like this on the basis of a motion.

THE JUDGE: An oral motion?

MR. WISEHART: Your Honor, I have not had an opportunity to examine the record. If you want one piece of paper saying that we move on the basis of that application, that appendix you have before you, we will certainly do it.

But we haven't had time to do it over this weekend.

It only takes one piece of paper, Your Honor and as I said, under Rule 7B, we are entitled to make such a motion.

THE JUDGE: Well, I am not going to accept any oral application at this stage for disqualification.

MR. KAHN: Your Honor is correct, Section 2A, 17 of the Bankruptcy Act, which must certainly overrule any local Rule, expressly provides, "That the Bankruptcy Court has the power to remove a Trustee only upon complaint of creditors on hearing after notice".

There has been no hearing, there

has been no notice, there have been no motion papers.

This is simply due to the customary obstinacy of these Attorneys in refusing to follow any of the correct procedures.

THE JUDGE: Forget that comment, forget that comment.

I am persuaded that it would be required on written motion and on notice to all interested parties.

MR. WISEHART: Your Honor, we will have that tomorrow in your hands.

MR. KAHN: If they do, it will not be part of this Chapter X proceeding motion because it is not before the Court now and nor is that appendix.

THE JUDGE: How are you going to give notice between now and tomorrow morning?

MR. FRIOU: To whom?

THE JUDGE: Mr. Friou said, "To whom?"

You said the creditors and all

the creditors entitled to notice are not sitting here.

MR. WISHART: His Counsel and the Trustee purportedly represent the creditors.

They are the parties in interest. If Your Honor wishes to direct that the notice be given to all creditors - -

THE JUDGE: I am not going to tell you how to bring the Order on.

I am going to suggest to you that I am not going to entertain an oral motion and you are perfectly capable of consulting with the Rules and the Act.

Now, let's move on to the merits of the good faith filing of the Chapter X proceeding.

Mr. Kahn and Mr. Angel have made certain statements that apparently Judge McMahon read this morning and in substance said if what they say is true, this Chapter X Petition was not filed in good faith.

Why don't you respond to what they

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have stated in their papers and in their Memoranda and let's get to the merits of the good faith filing.

MR. WISEHART: Your Honor, I wish to call Ralph Nogg as a witness.

MR. KAHN: Your Honor, I object.

I object upon the ground that all of the testimony with respect to whether or not this company might be reorganized and the precise nature of the reorganization was before Your Honor after six or seven days of hearing.

Mr. Nogg testified at great length. Your Honor wrote a lengthy opinion. Unless there is something specifically different or which contradicts Mr. Nogg's earlier testimony, all of that testimony is now before you.

We consented that every piece of paper and every word that was spoken of that hearing, except the motion to strike the Reply Brief, with that exception, everything is now before you and we can conceive of no

further testimony which could enlighten you anymore.

THE JUDGE: All right, Mr. Kahn. Let me ask you, Mr. Wisehart, what do you expect to elicit from Mr. Nogg that was not testified to in the seven days of hearing that we have had?

MR. WISEHART: I expect to elicit from Mr. Nogg testimony concerning not the Reameco proposal as such, Your Honor, but the possibilities for reorganizing R.E.A. successfully in its present situation.

I also expect to elicit from Mr. Nogg testimony about what he did at Yale Express as a Chapter X Trustee in order to give the creditors adequate notice of the proceedings, his manner of handling the claims that were submitted in that case, the manner of developing a Chapter X proposal that was submitted to the creditors and testimony about why in his opinion that procedure should be followed here.

Mr. Nogg also will testify that

the Trustee stated in his presence that he believed he had a conflict of interest.

MR. KAHN: I move to strike.

THE JUDGE: This is already part of the record, so there is nothing new.

Mr. Wisehart - -

MR. WISEHART: Judge Galgay, I am not finished, if this is an offer of proof.

THE JUDGE: Go ahead.

MR. WISEHART: Mr. Nogg will also testify that the Trustee told him that he was without transportation experience, that he would rely upon Mr. Nogg - -

THE JUDGE: Mr. Wisehart, isn't this all in the record?

MR. WISEHART: Your Honor, I don't believe that is in the record. We have argued that.

THE JUDGE: I have certainly heard it before.

MR. WISEHART: Yes, you have heard it but I don't think Mr. Nogg has so testi-

fied.

THE JUDGE: Go ahead.

MR. WISEHART: And that in his opinion the Bankrupt can be successfully reorganized.

That will be Mr. Nogg's testimony. We also offer the testimony of Mr. Dermott Noonan - -

THE JUDGE: Hold up a minute, let me comment on Mr. Nogg's proposed testimony.

I have already observed in my Opinion the high regard I have for Mr. Nogg, his talent, his experience and the commendations he received for the fine job he did in Yale Express.

However, I don't think that anything that you have mentioned can add anything to the record that I can review tonight at my leisure without having to burden Mr. Nogg with another lengthy examination.

I don't believe there is anything more that you have mentioned that is any

different than what I have heard.

MR. FRIOU: If I might add to what Mr. Wisehart mentioned as Mr. Nogg's testimony, it would also cover the fact that for a period of months during the early part of this administration, he - -

THE JUDGE: You are talking about the administration of the Chapter XI?

MR. FRIOU: No, after the Chapter XI proceeding and during the present Bankruptcy, that he - -

THE JUDGE: The liquidation?

MR. FRIOU: During the present Bankruptcy, which by the way, Your Honor, we feel is not limited to liquidation, since there is - - since it is permissible to operate a business within a bankruptcy.

That possibility was discussed with the Trustee as a better alternative to Chapter X at that time under the circumstances that existed at that time.

MR. Nogg would also testify that these proposals for a reorganization with-

in the bankruptcy, the development of the business within the bankruptcy were made to the Trustee and to its Counsel.

THE JUDGE: You are talking about the suggestion that they operate the Rexco Division?

MR. FRIOU: No, I am talking about the reactivation of the business by the Trustee as a going concern as the best means of realizing the most for the creditors, a fact, Your Honor, which Mr. Kahn has at one time advocated himself as a possibility.

That is what Mr. Nogg might also testify to.

MR. WISEHART: Your Honor, may I add to that, that through Mr. Nogg, we would like to offer his comments, a Memoranda on the same subject which were given to the Trustee by Mr. Tom Coyl, the former President of R.E.A. and Mr. Ray Miller, operations Vice President, which would also indicate that in their view there was a potential for a successful resumption of activities.

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The memorandum of Mr. Cohl - -

THE JUDGE: What is the date?

MR. WISEHART: It's dated February 1, 1976, when we started working on the Reameco proposal, with the Trustee's approval.

The memorandum of Mr. Miller is dated March 25, 1976, when we - -

THE JUDGE: Why didn't you call Mr. Cohl at the hearing we had for seven days?

MR. WISEHART: Because the hearing was on the Reameco proposal, Your Honor and that was something that we devoted all of our time, energy, money and attention to.

Your Honor, I think had no more time also. But it is a fact that the Trustee did consult with other people, who indicated to him that there was an opportunity for a successful revival of this business.

I have copies of these Memoranda here, Your Honor, which I am prepared to offer at this time.

THE JUDGE: No, I decline to take them.

MR. WISEHART: Well, may I have them marked for Identification.

MR. KAHN: Objection.

THE JUDGE: You may have them marked for Identification; but I don't see any point in burdening an already overburdened record with additional documents that could have been offered at a previous time.

But mark them for Identification.

(The above described document was marked Petitioner's Exhibit "1" for Identification, as of this date.)

MR. FRIOU: The document is a Memorandum from Tom Cohl to C. Orvis Sowerwine dated February 1, 1976.

(Another document was marked Petitioner's Exhibit "2" for Identification, as of this date.)

MR. FRIOU: This is a Memorandum from R. Miller to C. Orvis Sowerwine dated March 25, 1976.

THE JUDGE: Go ahead, Mr. Wisehart.

MR. WISEHART: Finally, Mr. Mogg would testify, Your Honor, that since the time of the hearing before Your Honor, he has had conversations with certain Governmental agencies in Washington, which lead him to believe that if R.E.A. were put into a Chapter XI - -

THE JUDGE: You mean Chapter X?

MR. WISEHART: Chapter X, yes, Your Honor.

THE JUDGE: Everyone has trouble with that number.

MR. WISEHART: The availability of Federal funds or loan guarantees would be a distinct possibility.

THE JUDGE: Well, that's about as forceful as the promise of $3,000,000 that your financial expert came up with.

It's a possibility, but it's not something you can lean on at the moment.

MR. WISEHART: Your Honor, the only

way you can determine that is to hear Mr. Nogg say it in his own words and then he will make it as forceful as he feels it is appropriate to do so.

I am merely characterizing the situation.

THE JUDGE: Well, I am going to decline to hear Mr. Nogg on that issue either because I think the state of the present record is all that is necessary to determine the good faith filing.

MR. WISEHART: All right, we make an offer of proof on those issues.

THE JUDGE: All right.

MR. WISEHART: Shall I go on to Mr. Noonan?

THE JUDGE: You may.

MR. WISEHART: Thank you. Your Honor, we also have with us in this Courtroom, Mr. Dermott Noonan.

Mr. Noonan is a distinguished certified public accountant.

He has among other things taught

accounting at Yale University and other institutions of higher learning.

He has functioned as an accountant in a number of large accounting firms.

He has been a management consultant. He has worked with Mr. Nogg in the Yale Express situation, in the Associated Transport situation.

He is familiar with good accounting practices, good transportation management and he is also very familiar with the management of data processing records and computer services.

In connection with the Notes case pending before a three Judge Court in the Southern Distict of New York, Mr. Robert L. Wright, who is Special Counsel to the Trustee on this case and myself in association with Mr. Wright, at Mr. Wright's request, asked that a study be made of what claims by the railroads were in the files of the Bankruptcy Court.

A request I believe had been made

with inconclusive ~~reports~~ to Mr. Angel as long ago as February.

Mr. Wright said he had to have the information and so I asked Mr. Noonan, who is associated with Farrell, Burden & Company, presently and a management firm and working with me on another case, to come down here to the Courthouse and make an examination of the records for the purpose of answering the inquiry of Mr. Wright.

Mr. Noonan's testimony I can summarize for you but Mr. Noonan is here, Your Honor.

THE JUDGE: Make your offer of proof.

MR. WISEHART: Your Honor, Mr. Noonan would testify that the Proofs of Claim in the files of the Bankruptcy Court here are in chaotic condition; that it took him approximately eight or nine days to complete a job that he should have been able to complete in a day or two.

That the computer printouts which

have been made on the basis these records were examined by him.

That the computer printouts are woefully inadequate.

That the classification of names is improper. That the use of the classification in other respects is not adequate for the purpose of a computer printout.

That the firm which does this work is in Kansas City, making it extremely difficult for anyone to find out exactly what they are doing, but that on the basis of his examination of the records and the computer printouts, he was able to determine that approximately 4,162 Proofs of Claim had names that had never been forwarded to the computer company.

That that testimony can be corroborated by another witness who is here.

THE JUDGE: What is the purpose of it in this proceeding?

MR. WISEHART: In this proceeding it shows - - and again Your Honor we are

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asking that a Receiver be appointed for the purpose of straightening out these files - - it shows - -

THE JUDGE: You think a Receiver would straighten out my Clerk's office?

MR. WISEHART: I think Your Honor, Mr. Nogg would testify on Chapter X that at Yale Express, when he was the Trustee, he took those claims under his own personal, physical custody.

That he developed a security system. That working with Mr. Neonan he classified the claims into twelve to twenty-four separate classifications.

That he personally handled each of the claims. That he responded to each of the claims.

That acknowledgements were sent out on each of the claims. That the creditors were given adequate notice in each step of the proceedings, none of which has been done here.

THE JUDGE: Okay, anything else

that Mr. Noonan would testify to?

MR. WISEHART: I believe that would be the sum and substance of Mr. Noonan's testimony.

THE JUDGE: All right, well I decline to allow Mr. Noonan to testify.

I will rely on the record as it stands, but you have made your offer of proof.

MR. WISEHART: Thank you.

THEJUDGE: Anything else?

MR. WISEHART: Your Honor, Mr. Robert J. Devlin would be called as a witness.

THE JUDGE: Is he here?

MR. WISEHART: He is not here today because he has been unexpectedly detained in Chicago.

THE JUDGE: Well, let's forget about his testimony.

If he is not here, he wouldn't have the opportunity to testify.

MR. WISEHART: Your Honor, we had anticipated that Mr. Devlin would be here first thing tomorrow morning and I note that

it's a quarter to four.

THE JUDGE: Depending on whose watch you are using.

Mine says a quarter to four, that clock says three-thirty.

Do you want to split the difference?

MR. WISEHART: I will split it with you.

MR. KAHN: We consent, Your Honor.

MR. WISEHART: Mr. Devlin would testify that he heard the Trustee state on at least two occasions that he believed that he had a conflict of interest.

Mr. Devlin would also state that based on information and belief in connection with his capacity as Vice President of the B.R.A.C., all of the employee creditors would support one, a Chapter X Petition and two, the application for a Receiver in this proceeding.

Mr. Devlin would also be able to state, based upon information and belief, that if this were in a Chapter X proceeding,

Federal agencies in Washington would look favorably upon requests for funding.

THE JUDGE: Is that all?

MR. WISEHART: Yes, sir.

THE JUDGE: If Mr. Devlin were here, I would not entertain his testimony.

I would rely on the record already in existence.

MR. FRIOU: Mr. Devlin would also testify that he also pursued repeatedly from the beginning of this administration an effort to persuade the Trustee to take an interest or in other ways to go into Chapter X or reorganize this company in an orderly way.

THE JUDGE: All right, I am going to take a brief recess.

Mr. Wisehart, when I return, I would like to have you address yourself to those items that the Trustee and his Counsel urged upon Judge McMahon this morning.

Number one, that this was a proceeding that was in Chapter XI for some

approximately eleven months, ten or eleven months, I forget the exact number. In the course of those proceedings they managed to build up administration expenses in the amount of - -

MR. ANGEL: $19,000,000.

THE JUDGE: (Continuing) - - $18,000,000, $19,000,000. That it has been adjudicated since October - -

MR. FRIOU: November 6th.

THE JUDGE: November 6, 1976, during which time considerable time and expense has been spent by the Trustee and his Counsel liquidating the affairs of R.E.A. Express.

Also direct your attention to the general principals of equity as to whether or not it would be fair to all creditors to at this point take the $6,000,000 or $7,000,000 that has been accumulated at such great expense and now turn it over to a Trustee to operate an entity looking forward to a plan of reorganization.

Also bearing in mind, that if a

Receiver were appointed at this point and if the Receiver needed Counsel, we have added another level of expense if a Trustee were appointed and he would need Counsel and accounting services, we would have added another level of expense.

So as I count it, we'd have the Chapter XI administration expenses, the expenses of the Trustee and his Counsel in liquidation, the expenses of a Receiver and his Counsel and the expenses of a Trustee and whatever other Counsel and accounting services he needs.

Then answer me whether or not you really think, in good faith, a Chapter X Petition would bring about the desired result that you talked about in your papers.

I will take a ten minute recess.

MR. FRIED: We did not proceed with these papers until 10:30 this morning, although we spent all weekend in our office and were available to be served with them.

We didn't get them and we have not

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even had a chance yet to read all of them.

One of them we got this morning, one piece of paper, which was an Affidavit by Mr. Kahn, was served on us this morning at 9:00 o'clock. That we read.

MR. ANGEL: When we come back, I will address myself to all of that.

THE JUDGE: All I am saying is once it goes to the District Court, I don't control the flow of papers, when they have to be in or how many. All I know is Judge McMahon sent it back to me with a message to hear and determine and report back to him.

Off the record.

(Discussion off the record.)

THE JUDGE: Mr. Wisehart, are you prepared to go forward?

MR. WISEHART: Yes, I am. Before I go forward with my conclusion to complete my offer of proof involving Mr. Noonan, I would like to have his letter of today's date be marked for identification.

THE JUDGE: All right.

MR. KAHN: Your Honor, we haven't seen it.

MR. FRIOU: I will give it to you.

THE JUDGE: It's only being marked for Identification.

I am not allowing anything by way of additional evidence documentary-wise in this record.

Mr. Wisehart has a right to protect his position.

MR. KAHN: Thank you.

MR. WISEHART: I would like also to state that it is the position on behalf of - -

MR. FRIOU: Mark it.

(The above described document was marked Petitioner Exhibit "5" for Identification, as of this date.)

MR. WISEHART: Your Honor, we also submit that the offer of proof made on behalf of Mr. Noonan and supports Petitioner's motion under Federal Rule 60B to set aside the proceeding involving

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the Reameco - All-Trans proposals on the ground that the decision therein is void for lack of adequate notice given to the creditors.

THE JUDGE: I am not quite sure - -

MR. KAHN: Excuse me, I have never been served with any such motion.

MR. WISEHART: We are making this motion orally under Rule 7, Federal Rules of Civil Procedure.

This is information that has come to our attention during this past weekend and we thought it was incumbent upon us to bring it to the attention of the Court at the first opportunity.

THE JUDGE: Well, now, would you restate what your motion is please.

MR. WISEHART: The motion is to set aside as null and void the decision approving the All-Trans proposal and the hearing therein for lack of adequate notice to creditors on the ground that over 4,000 creditors could not possibly have received notice of that pro-

ceeding, based upon the offer of proof made in connection with Mr. Norman's purported testimony.

THE JUDGE: All right, I will reserve on that for the moment, but I will expect to hear from Mr. Angel and Mr. Kahn.

MR. KAHN: I can't right now.

THE JUDGE: Why don't we hear from them now and why don't you address yourself to those points that I raised before the recess.

MR. WISEHART: May I have some rebuttal on that?

THE JUDGE: Mr. Wisehart - -

MR. WISEHART: If you are going to hear from them on this, I want rebuttal.

THE JUDGE: Okay, all right. We have to give some respect for death at some time. We may all die here at some time.

MR. WISEHART: Well, Your Honor, let me say something about that.

THE JUDGE: Don't, I withdraw the comment.

MR. WISEHART: We know that Judge Edelstein for example is sitting several years on the I.B.M. case, considering the sort of theological question about whether there is a monopoly, but there could be nothing more important than this proceeding.

THE JUDGE: All right, I have withdrawn my observations.

I will hear Mr. Kahn on your oral application.

MR. WISEHART: Thank you.

MR. KAHN: Your Honor, Mr. Angel has discussed this matter with Mrs. Minkoff.

I would prefer, with respect to the factual aspect of it, that he handle it.

But I would just like to point this Court's attention in the case of In Re: Realty, a decision of the Second Circuit, by Judge Augustus Hand, which held that once an Order of sale has been confirmed, that no matter how serious the notice inadequacies are, even if the notice in this case specifically provided that there would be a sale by lots

and in bulk and the sale was only in bulk and not by lots, that the moment that the Bankruptcy Court signed an Order confirming the sale, that no Court was within - - had no power to set that sale aside.

That certainly would apply in this case, Your Honor, where the notice, if defective, was defective only in that some creditors, presumably did not get it.

However, I would now like Mr. Angel to advise the Court.

THE JUDGE: Let me ask you, how many creditors are there in the R.E.A. case, if you know?

How many do you generall have to notice?

MR. KAHN: Well, Your Honor, we did at one time have over 20,000. The 20,000 - - subsequently that list was cut down to about 16,000 odd.

THE JUDGE: You are talking about employee creditors or all creditors?

MR. KAHN: No, I am talking about

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all creditors.

THE JUDGE: All creditors?

MR. KAHN: All creditors, Your Honor.

THE JUDGE: Mr. Angel, you will be brief, won't you?

MR. ANGEL: Yes. First of all, I must correct Mr. Kahn in one respect and that is it is the holding In Re: Burr Manufacturing & Supply Company, which holds that any defects in the notice is corrected once the sale is confirmed.

MR. FRIGH: Is that B-u-r-r?

MR. ANGEL: Burr Manufacturing Supply Company, 217F. 16, a 1914 case, Second Circuit.

THE JUDGE: Are you sherbordizing?

MR. ANGEL: Yes. If Your Honor please, secondly, with regard to the notice, as Your Honor knows, the question of the notice in R.E.A. has been one of the tremendous difficulties for this Court, the Clerks specifically, by virtue of the clamorous

volume of the Proofs of Claims that were filed with the Clerk.

Recognizing this, the Trustee did one thing and that is we made available to the Clerk of the Court an employee of the Trustee who sat in the Clerk's office for the purpose of helping in the docketing of Proofs of Claim.

Additionally, the Trustee has attempted to see to it that notice went out to all creditors who filed here, without any of the physical work in that respect being done by the Trustee or his Counsel.

As Your Honor knows, the Clerk of the Court has an understanding with Electronic Data Processing, Inc. of Kansas City, pursuant to which that - - it is fed to that data processing firm; all of the Proofs of Claim, the names of the claimants, the amounts, et cetera.

It is from Electronic Data Processing, Inc. that the notices with regard to all of these hearings for which creditors

have to get notice, to wit: The application on behalf of All-Trans, goes out.

In the filing with regard to the All-Trans hearing, I believe that the notice went out to over 25,000 creditors; in fact close to 30,000.

THE JUDGE: Wasn't there also publication?

MR. ANGEL: That's the next fact that I was going to bring to the Court's attention.

In addition to the actual physical notices, there was published in the Wall Street Journal, National edition, in the New York Times business section, Sunday edition and in Traffic World, a transportation weekly, notice with regard to all the proceedings which were about to take place on the application of the Trustee to dispose of the operating authorities of the Bankrupt.

So if there is -- if there were some creditors who have filed Proofs of Claim and for one reason or another that information

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has not been transmitted by the Clerk of the Court, we feel that error is most certainly corrected by the publication and the honest efforts made by both the Trustee, the Clerk of the Court and everybody concerned to bring proper notice to all interested parties.

Thank you, Your Honor.

MR. KAHN: Excuse me, I would like to ask one last item.

That is assuming that 4,600 creditors who didn't get the notice and every one of them came to this Court and every one voiced their objection, that would not be relevant at all with respect to the determination of the Court or with respect to binding the Trustee.

As Your Honor knows, under the Bankruptcy Act the Trustee is, as a matter of law, required to make these decisions, with the approval of the Court.

Therefore, if all 4,000 showed up and objected, it wouldn't amount to a row of pins.

MR. NISHART: Your Honor - -

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THE JUDGE: This is your rebuttal?

MR. WISEHART: Yes. We have examined In Re: Realty. The case has subsequently been superceded by a Supreme Court decision and by decisions in other circuits making it clear that in these circuits, as does Rule 60, parties in the position of these petitioning crediters as well as Reameco can challenge the fairness under which this proceeding was conducted.

Now, the 1914 case that Mr. Angel has cited I have not had an opportunity to look at but all of the cases that I have examined, I have examined them because this was the subject of the argument before Judge Worker, are subsequent cases.

I don't believe that they could vary the rule that if the proceeding was not fairly conducted or conducted in accordance with orderly procedures, that those who are agrieved by that conduct may seek to have it set aside.

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THE JUDGE: Well, I will make a ruling on your oral application now.

I deny it for the reason that I feel that the notice that was sent out by the Clerk's office through the Electronic Data Processing firm was done on the best information available to the Clerk's office in light of the tremendous volume that they are handling, not only in R.E.A. but other cases of mine, including W.T. Grant.

If there were any error in not notifying some 4,000 creditors, as you claim, certainly the publication in the Wall Street Journal and in the New York Times and the trade papers could well cure any such oversight.

That's my finding for the record.

MR. WISEHART: Your Honor, I respectfully except to that finding and point out that in the offer of proof, it includes testimony that the reason these names were not transmitted to Electronic Data Processing was on the instruction of the Trustee, who

told them not to because it would be too expensive and that this was known at the time of the hearing when we raised a question as to whether all of the creditors had received notice.

MR. KAHN: Your Honor, there is one further point and that is - -

THE JUDGE: I excluded the possibility of that evidence being introduced, so that I will stand on the rulings that I have made.

MR. KAHN: I was also going to say that this proceeding is brought by Petitioning Creditors who were not parties to the Reameco proposal.

Only Reameco, it would seem to me, could even raise this issue and they are not here.

THE JUDGE: Reviewing Court can deal with the order as it exists. If I am in error, I am in error.

MR. WISEHART: Thank you, Your Honor.

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Now, I will address myself to, as Your Honor directed, to the points that were made by the Counsel for the Trustee, although as Mr. Friou pointed out, we have not had a great deal of time to study them.

However, let me focus particularly upon Your Honor's comments before the brief recess.

The first inquiry Your Honor made had to do with the amount of time since adjudication and whether or not, in view of the fact that this has been something that involves an adjudication that took place in November of 1975, at this time a Chapter X proceeding - - a Chapter X Petition may be properly entertained.

Counsel for the Trustee have asserted a number of times that they feel under some obligation or mandate to proceed with liquidation as a natural offshoot of the adjudication on November 6, 1975.

It is that position to which I wish to address my remarks.

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Now, Your Honor, in that connection, referring to the transcript of the proceeding of this Court on November 5, 1975, which was the date on which Your Honor ordered that indemnity be put up, if Your Honor recalls.

It was by those - - it was by no means clear at that time that the adjudication of R.E.A. would result in the cessation of operations or would preclude the reorganization of the company.

As a matter of fact, if in that transcript, it appears that the possibility of a reorganization of the company was distinctly and specifically left open.

Mr. Olick in his summation pointed out all of the achievements that had been made during the Chapter XI proceeding, Your Honor, under Your Honor's supervision.

The Chapter XI proceeding took place from February to November and there were a few unfortunate circumstances in that proceeding, but on the whole, the direction of

the proceeding was definitely up.

As Mr. Olick very aptly said on Page 25 of that transcript, the operation in essence has been successful, but the patient is dying.

Now, why was the operation successful? - - If I may just take a moment to focus on that, I think it will lay a foundation for shaping what happened thereafter.

The operation was successful because during that period of time the high fixed costs of the Debtor in Possession had been markedly reduced through Plan B. 1, Your Honor probably recalls; the terminals were consolidated and approximately 300 terminals were reduced perhaps to less than 100.

Now, Mr. Nogg will testify - - would testify under his offer of proof that in 1969 over 700 terminals, from 1969 to 1975 there was continuing progress in knocking out the fixed costs that were eating away at the possibility of the survival of R.E.A.; to such an extent that in 1974, when we had

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a decent economy, as Your Honor knows, the company made between $2,000,000 and $3,000,000 in profit.

Now, that is all spelled out in the Memorandum from Mr. Cohl that we have.

THE JUDGE: I am familiar with that but over the whole period of time, they finally turned the corner in November, I think it was and then December showed a loss.

MR. WISEHART: Yes, December is a seasonal month because of the fact that in the express business that the shippers ship their Christmas inventories prior to December.

So there is a complete letdown. That's been the history of the business.

But December does not indicate the true prospects.

THE JUDGE: The whole point of the argument though Mr. Wisehart, is it not, that in November or October of 1975 they weren't able to meet a weekly payroll, they had no choice?

MR. WISEHART: That is correct.

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They were not able to meet a payroll and time was not allowed for working this matter out with the union.

I don't think it's fair to say there was no choice.

The union representatives are here - - were here. Your Honor asked Mr. Kahn for twelve more hours, as I recall it, and Mr. Kahn took the responsibility of saying the situation is so ridiculous that it's not worth it.

Well, somebody has to answer for that. But the fact is that there was still a possibility of trying to negotiate something with the union representatives which would have deferred those payroll responsibilities.

Now, we come to the progress that was made until November.

We also note that in connection with the consolidation plan which the company had put through it was also possible to get relief from restrictive labor contracts.

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That was a very great plus to the company because some of those contracts had conditions that could have stood in the way of a successful reorganization.

Now, when we came to November 5th, therefore, Mr. Olick was fully justified in noting the progress that had been made.

There had been fantastic progress and he so stated.

He said that he had never seen a group of people to work so hard to accomplish such a worthwhile objective.

So that when it was necessary to have this transition, the Trustee and Counsel for the Trustee left open the possibility that operations would continue and statements were made to that effect.

One creditor raised a question about what was meant by the statements made. He was Mr. Bursky of Aetna, I believe.

Mr. Kahn responded by stating, this is on Pages 33 and 34 of the transcript: "Excuse me", he said, "I have said nothing,

I don't know where Mr. Bursky gets the impression that the Trustee has any plans to run this operation himself. Precisely to what extent he will continue which operation remains to be seen. I want it quite clear that I am not now announcing the Trustee is going to continue or discontinue any phase of the operation".

That was the statement made on November 5, 1975 and I think it was a fair statement.

That was my understanding of the situation. Following that, as Your Honor knows, there was a review of the situation.

Initially an embargo had been issued on all shipments, which was subsequently modified to permit the Rexco operation to continue and the Trustee was talking with a number of people; Mr. Cohl, Mr. Miller, myself, about the possibilities of resuming operation.

During that period of time, that was held out as a distinct possibility.

The Trustee himself on a number of occasions used a very beautiful figure of speech.

He said that he envisioned that maybe some day the express company would arise like a phoenix from the ashes.

Now, that was said to a number of people who proceeded on those statements to work and try to develop a plan - -

THE JUDGE: All right, Mr. Wisehart, that is all fine but will you get down to the point that I asked you just before recess.

You have to deal with experience from February to November when in a Chapter XI proceeding the Debtor in Possession lost some $19,000,000.

Now, it was adjudicated at that time. Since that time, there has been time and expense involved in liquidating the estate.

At this point and through your filing of the involuntary Chapter X, you want to try and now resurrect an express

business, probably with the funds that have been collected in liquidation to assist in the new operation.

MR. WISEHART: That Your Honor is something that I want to respond to right now because - -

THE JUDGE: All right, concentrate on that.

You don't have to review what's been in seven days of hearing or what's been in twenty-four months of both of our experience.

MR. WISEHART: I recognize that. I wanted to lay the foundation for what I am about to say.

Your Honor said is it fair to the creditors to take that six or seven million dollars that has been collected from the disposition of the assets and use that, turn it over to a Trustee in a Chapter X proceeding.

That was Your Honor's inquiry. Now, first of all, we have the preliminary question, Your Honor, whoare the creditors? - - Now, Your Honor, it is a fact that Mr. Olick

has given an opinion which I disagree with, as Your Honor knows, on the effect of the rejection of those contracts in the Chapter XI period.

So I will set that aside. That has never been disposed of.

Setting aside the employees' claims for the Chapter XI period, there are undisputed claims for the pre-Chapter period; $11,000,000 in vested employee vacation benefits.

There are also claims antedating the time when the contracts were set aside and in addition, there are claims based upon the breach of their vested health and welfare benefits which were not, in my opinion, rejected by the contract, and the Second Circuit, In Re: Strauss against DuParquet which is in our Brief, holds specifically - -

THE JUDGE: I am aware of that. How can we deal with pre-Petition creditors until we dispose of post-Petition creditors?

You are aware as well as I am that

General Motors, some of your big trucking companies, some of your - - Flexi-Van, what-not, they were either not being paid at all during Chapter XI or they were being paid at the rate of forty cents on the dollar while they were in Chapter XI.

My whole point, Mr. Wisehart, is to try to point out the difficulty I have and perhaps the Court above me would have in really trying to find out whether or not there really is any adequate relief that is obtainable under a Chapter X plan, when you are faced with the disaster that befell us in Chapter XI.

MR. WISEHART: I just wanted to raise the inquiry about who are the creditors because we have both pre-filing and Chapter XI creditors and the employees' claims under Chapter XI certainly have not been finally determined.

THE JUDGE: All right.

MR. WISEHART: Okay, passing that point, which I happen to think is a very

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strong reason for going into Chapter XI before it's too late.

The six million dollars or seven million dollars Your Honorspoke about and said, "How can I make sure that if we go into Chapter X we don't in some way jeopardize that six million dollars or seven million dollars; am I supposed to turn that right over to a Trustee so he can shovel it out and the creditors won't get it?"

Now, first of all, Your Honor should understand that the offer of proof that is being made is that Mr. Nogg will testify that using the Rexco operation alone and the profits it is throwing off, which is estimated to be in the vicinity of $2,000,000 a year, he will use that as a building stone tax free because of the Chapter X situation in order to expand operations without touching the six million dollars or seven million dollars if that be necessary.

Now, I want to bring this out because there may be some misconception between

what we are now talking about and the Reameco proposal.

The Reameco proposal Your Honor will recall, involved an accellerated expansion of express business based upon financing which Mr. Nogg testified would be available.

But now we are talking about a Chapter X proceeding, which would not require such financing based upon the Rexco operation as a cornerstone to that.

Now, Your Honor also must be aware, I am sure, of the procedure in a Chapter X proceeding.

First of all, Your Honor, of course you have to set up committees of creditors. Mr. Nogg would testify that when he went to Yale Express - -

THE JUDGE: I am familiar with Chapter X.

MR. WISEHART: So that before any action could be taken under Chapter X which would in any way implicate the funds that are available, it would have to be approved

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by the creditors, by the duly authorized representatives of the creditors.

What we have said all along, what we say now is that it is for the creditors themselves to decide what level of risk they wish to take.

It is their money and they should be the ones who make the determination as to the level of risk.

If they want to risk part of the six million dollars or seven million dollars, it's up to them to decide and if they don't, it's up to the creditors to decide.

That, Your Honor, knows is the law.

THE JUDGE: I am not sure I agree with you on that.

MR. WISEHART: Well, then we should ask Mr. Nogg to take the witness stand.

THE JUDGE: No, we are not going to ask Mr. Nogg to take the witness stand.

MR. WISEHART: Because he knows what the administration of what Chapter X is.

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THE JUDGE: He may know what Judge Tyler did in Chapter X but that doesn't necessarily mean it's the law.

MR. WISEHART: That means it is administratively feasible under what Judge Tyler did and that's worth something, I would submit.

After all, Your Honor - -

THE JUDGE: The Trustee is entitled to take certain actions subject to the approval of the Court in Chapter X.

MR. WISEHART: That is correct, and the protection that the creditors would have under Chapter X.

Every step of the way would be subject to the approval of the Court.

As I said - - now, again, this is something - - this is going to Mr. Nogg and his experience.

His first step was to call the creditors informally together and to seek their continuing guidance, making monthly reports, asking them what he wanted to do.

When he got at Yale Express, he found that there were - -

THE JUDGE: Don't tell me about Yale Express.

I have trouble enough with Railway Express.

I have already given Mr. Nogg all the accolades I can for what a splendid job he did in Yale Express, but let's stay with Railway Express.

MR. WISEHART: Well, Your Honor, we, of course, say that the same medicine is applicable in the case of R.E.A. Express and that because of the interests involved, Mr. Nogg is the one who can tell best how it can be done.

Now, so we feel that in fairness to the creditors, this is the best way to go.

Now, Your Honor raised the question about well, is it fair to get a whole bunch of other accountants and other lawyers and a whole other level of administrative expense on this.

Your Honor, there is a practical answer to this.

What we are trying to evolve here is not another level of expense. We are trying to evolve proper policy guidance in the context of the Bankruptcy Act.

We are trying to formulate a procedure for having the guidance which the creditors are supposed to give to this type of proceeding in terms of how much do they want to spend.

It is not necessary to get other accountants. It may not be necessary to get other lawyers involved.

It's a question of the direction of the Bankrupt estate, the present guidance that the people involved have seems to be that they are under a mandate to liquidate and that is the thing that we seek to question in this proceeding.

Finally Your Honor asked me what I thought in good faith; whether I really think in good faith that a Chapter X at this

state of the proceeding has a prospect of achieving success or anything for the Bankrupt estate.

I appreciate Your Honor's asking me that question because I really would like to respond to it.

I feel that Doctor Nelson's testimony before Your Honor is the touchstone of my feeling.

He said that it has been his experience as a transportation expert that sometimes companies get into a condition where they have to die to live again.

I think that is the condition of this present Bankrupt.

It has succeeded in eliminating those fixed expenses of obsolete facilities which were pulling it down.

It has succeeded in achieving an entirely new labor contract, labor attitude.

It has succeeded in developing a profitable segment of an operation, a segment which Mr. Nogg, as long ago as 1969, had

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recommended and that is the Rexco operation.

It is making $2,000,000 a year. Those are successes that change the previous chemistry of the situation.

Those are the things that can be used in order to build up and rehabilitate the company.

Now, Your Honor, in order for that seed money that the Rexco operation spins off to be preserved for the rehabilitation of the express company, the authority which Rexco operates under has to be preserved.

Now, Your Honor has already heard debate on the questions of the All-Trans proposal versus the Reameco proposal on that situation.

The fact of the matter is that in the argument before Judge Worker, Mr. Kahn stated, and it is in the transcript, cited in our Memorandum, that he had great doubts whether the All-Trans proposal would be accepted before the I.C.C.

Now, the picture that was painted

before Your Honor in the hearing before you was that the All-Trans proposal would be a shoe-in, virtually guaranteed success.

Now we are hearing before Judge Worker that Counsel for the Trustee themselves have great doubts about whether it will be accepted.

Now, I submit Your Honor - -

THE JUDGE: You mean whether or not I.C.C. will approve the temporary rights?

MR. WISEHART: Yes.

THE JUDGE: That's a little different.

MR. WISEHART: No, no, I don't mean that, I mean what I said. I mean that Counsel for the Trustee said he had great doubts and this is a quote, whether All-Trans would be accepted.

THE JUDGE: Accepted by whom?

MR. WISEHART: The I.C.C.

THE JUDGE: Okay, all right. Can you wind down in a few minutes?

MR. WISEHART: I respectfully submit

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that one of the great advantages of a Chapter X in this situation would be to put a different face on the proceeding before the I.C.C.

That it would tell the I.C.C. that there is a prospect for a look at and an attempt to revive this company.

That it's not just in straight liquidation and that through deference to the Bankruptc- Court, they should permit this attempt to go forward until the matter can be properly determined.

Your Honor, my feeling about this, is that that alone would be sufficient basis for the Chapter X Petition which we have offered.

But I don't wish to base it on that alone. I wish to align myself also with the views of which Mr. Cohl had about the possibility for reviving the company in February; the views that Mr. Miller had about the possibility of reviving the company and finally, associate myself with the views of the finest

transportation man I have ever known, Mr. Nogg and say that based upon Mr. Nogg's views and the views of these other people in transportation, it is my view that a Chapter X proceeding at this point would have every prospect for accomplishing a successful reorganization of this Bankrupt.

THE JUDGE: Does anyone else need to be heard or want to be heard?

MR. KAHN: Yes, the Debtor must be heard from, it is required under the Statute.

Mr. Olick, the Attorney for the Debtor is present.

MR. OLICK: If Your Honor please, whereas the Debtor was not served formally and in accordance with the Rules, but with the Petition now before you referred by Judge McMahon, we have waived that and we have filed an Answer.

We have gotten a copy of the Petition. I have read it. I have prepared and filed an Answer which was filed today.

With respect to the merits of the

proposal, I would ask that the Court as part of the record consider the proceedings before this Court of November 5th and November 6th, 1975, at the time when, on November 5th, this Court directed the posting of indemnity and on November 6th, upon the failure of the Debtor to post that indemnity, adjudicated the R.E.A. companies as Bankrupts.

There was testimony and there were statements given at that time to which Mr. Wisehart alluded and I think the complete record of those proceedings in this Court should be before Your Honor as well.

I would simply like to say most reluctantly that we do not believe that the standards required for a Chapter X proceeding have been met, particularly at this late date.

I can tell the Court, as the record reflects in the prior proceedings in Chapter XI in this Court that the Bankrupt corporations, very carefully considered every possible means for survival, including most particularly Chapter X.

As Mr. Wisehart, who is a former director of R.E.A. and its former General Counsel knows, every possible means for securing financing, consolidating operations, dealing with the labor problems and the contracts with the various labor unions were explored.

I think this Court knows and if anyone is in doubt, I will say so, that in my opinion, as well as in the opinion of others, one of the factors that precipitated this company into Bankruptcy was the unfortunate wildcat strike that was called.

R.E.A. never recovered from that in terms of its revenues. Yes, there were consolidations. There were consolidations over the objections of the New York part of the B.R.A.C. union, headed by Mr. Devlin at the time.

It took an injunction that was obtained by myself with the assistance and cooperation of Mr. Wisehart to stop the wildcat strike.

MR. FRIOU: Your Honor, may I be heard?

THE JUDGE: No, let him finish. Let him finish.

MR. GLICK: Every possible means of financing at the time was explored.

I personally sat with many of the representatives of the union, some of whom are here today, pleading with them to agree to new arrangements so that the company could reduce its labor costs, effect the consolidations and survive.

And yes, indeed, great progress was made.

That progress was made, as I indicated on November 5th, with the full cooperation of the Creditors Committee, of its Counsel, of the Trustee, who was then only Standby Trustee, who helped wherever possible in exploring possible means of financing for the company, and sources of Federal and agency funds of various kinds and with the particular cooperation of many of the creditors

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of the company during the Chapter XI period, who received either nothing or no more than forty percent of what was due to them at the rate of a hundred percent from the Debtor in Possession.

Now, I believe that all of these items reflect upon the proposal to go into Chapter X at this late date.

The prospect that is held out for presumed operations on a National level, the prospect of new jobs for the 8,000 employees of R.E.A. who lost their employment because of what happened to this company, I submit is a cruel hoax, because the proposal is that when, as, and if the revenues derived from the Rexco Division, which does not provide any substantial employment, if any at all, are sufficient and if the company in Chapter X or otherwise can obtain financing, if it can buy vehicles and terminals and find customers, all of which it does not presently have, then perhaps the company can operate its authorities by itself on a National basis.

There are no trucks, there are no vehicles, there are no terminals and the time for that was when the company was still viable and when the company was compelled, because it could not meet its payrolls and comply with the laws that required us to meet them, when it was unable to get the cooperation of Mr. Devlin and the other union officials, when it couldn't meet these payrolls, maintain its operations despite the cooperation it had at the time from many creditors and suppliers, it was at that time that there was some hope.

I submit that there is not now hope. There is not under the Bankruptcy Act, as I understand the Bankruptcy Act, the availability to liquidate a substantial part of the company in a bankruptcy and then take what is really the sole viable or profitable segment, use the monies from the massive liquidation in the hopes that something can be resurrected.

I think it is - - and this is my final point - - most significant that the

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proposal underlying this Chapter X application is predicated on the identity of a Trustee and his particular experience and is predicated upon Mr. Nogg becoming the Court appointed Trustee.

As we all know, it is for the District Court to appoint a Trustee.

The District Court is in no way bound by the personality of any particular individual.

If the Chapter X Petition is viable at all, it must stand on its own two feet and on its own merits, regardless of who Mr. Nogg is.

I question whether Mr. Nogg would be appointed by the District Court, particularly in the light of the fact that Mr. Nogg was an unsuccessful bidder for operating authorities.

It is highly questionable that the District Court in its discretion would appoint him.

We cannot predicate a Chapter X

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application on the personality of any individual.

Therefore, on behalf of the Debtor itself, I question the viability and the good faith of this proposal.

MR. WISEHART: Your Honor, may I respond?

THE JUDGE: Mr. Wisehart, let Mr. Angel - - I am glad to see that he is awake. He was nodding there.

MR. ANGEL: No, I was in complete agreement with what Counsel had to say. I wish I was as eloquent.

All I wanted to say was the Trustee joins in what I consider to be Mr. Olick's application, to wit: That this Court consider that it have before it the proceedings had before this Court and minutes of those proceedings of November 5th and November 6th, 1975.

I consider that those are most important.

MR. WISEHART: Your Honor, may I

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be heard?

THE JUDGE: You are going to be brief, Mr. Wisehart, I have been very generous with you on time and I do want to try and - -

MR. WISEHART: Yes. I simply want to clear up one misconception, Mr. Nogg's instruction.

Had he been permitted to testify, he would have stated that he would not be available to serve as Trustee in this matter.

He would cooperate with the Trustee but that the Chapter X Petition that is being made is not being made on the predicate of Mr. Nogg as the Trustee.

We fully recognize that the Court could and should appoint an independent Trustee for the purpose of rehabilitating this company.

I also want to state that Mr. Olick appears for the Debtor in Possession. I don't know what authority he does so. I move to strike his remarks because - -

THE JUDGE: Well, maybe we will

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hear from Mr. Kahn because he made some representation that he is required to appear.

MR. WISEHART: Well, Your Honor, before doing that, I note that there is a gentleman in the Courtroom who has asked to be heard on that subject.

He is Mr. Deer, Counsel for Allen & Company.

MR. KAHN: Excuse me, Your Honor, I would like to point out at the All-Trans hearing, when Allen & Company sought to be heard, Your Honor recalled that since they were merely shareholders and since it was perfectly apparent from the figures submitted by Price, Waterhouse that there were insufficient funds even to pay creditors, that the shareholders might not be represented and Your Honor excluded from the testimony any representations made by that shareholder, Allen & Company, the very one who seeks to be heard here today.

THE JUDGE: I don't know whether he

has a different reason for being here today than he did on those rights, but I will hear it.

MR. ANGEL: Also, if I may, Your Honor, before Counsel is heard, I would like one other point brought to the Court's attention.

That is, Allen & Company is a very unusual type shareholder, in that it is a shareholder who by agreement with the Interstate Commerce Commission had absolutely no voice in the management of the company by virtue of the fact that they have been prohibited from so acting in agreement with - - I believe it was the S.E.C. - - I believe it is the S.E.C.?

MR. DEER: The I.C.C.

MR. ANGEL: The I.C.C.

MR. DEER: I will be very brief, less than one minute. Allan & Company owns less than 32% of the R.E.A. holding company.

We simply want to go on record at this time that we are in favor of the Chapter

X Petition and also for the appointment of a Receiver.

We believe basically that there are residual values here which can be recovered for the estate.

If there is a Chapter X proceeding -- there are great values here in the liquidation and in the operation.

Now, as far as Allen & Company being under an Order of the I.C.C. to divest itself of R.E.A., that came about because they had another transportation property and the I.C.C. said they could not have both.

MR. WISEHART: C.A.B.

MR. DEER: C.A.B., excuse me, and they elected to rid themselves of the R.E.A. over a period of three years.

However, Allen & Company is vitally interested in having this thing turned around so it can get some value for the thing which it is required to sell.

Thank you very much.

THE JUDGE: Thank you very much,

Mr. Deer.

MR. KAHN: Your Honor, I will be extremely brief.

Under Chapter X, Rule X-112, the Debtor is permitted to file an Answer in the proceeding.

I wanted the Debtor to appear here today because in the unlikely event that the Chapter X should be approved, it could not be finally approved until a summons had been issued on the Debtor and the Debtor had twenty days to answer.

That would have further delayed the matter and further thrown the question of the automatic stay into confusion.

Now that Mr. Olick has appeared and filed his Answer, this Court may proceed to a final decision on this without any further notice to creditors.

My only other comment - -

MR. WISEHART: Your Honor, if Mr. - -

THE JUDGE: Mr. Wisehart, let him

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finish.

MR. WISEHART: He is going on to something else.

THE JUDGE: Well, let him. Go ahead, Mr. Kahn.

MR. KAHN: Your Honor, I would like to make just a few very brief observations on Mr. Wisehart's presentation.

First and foremost, his failure to give any indication of why this Petition was filed in good faith, I think speaks more loudly even in Mr. Olick's excellent presentation.

Number two, I would like to call the Court's attention, though I feel embarrassed doing it because it's so elementary, Section 47A of the Bankruptcy Act requires the Trustee to collect and reduce to money the property of the estate and the Trustee has no other alternative whatsoever. He never did have such alternative and moreover, Mr. Wisehart's suggestion that a bankruptcy is run by an election every time of the

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creditors where you count votes on which proportion wants this and which proportion wants that, or that they are convened before the Court on any occasion, as Your Honor knows, has no basis in the Bankruptcy Act and never had any basis in the Bankruptcy Act and is part of the fantasy and nothing but fantasy as to how Mr. Wisehart views a bankruptcy case.

I would like to point out although Mr. Olick covered it, that any contention that the Creditors Committee adjudicated this Debtor a Bankrupt is wholly untrue.

The Debtor itself consented to it. The fact is, Your Honor, that the creditors committee, including myself, opposed the adjudication at the time that it happened, and wanted an additional period of time to go by in the hopes that something could be worked out.

The Debtor itself asked for the adjudication because it ran out of funds.

THE JUDGE: All right, I - -

MR. KAHN: I think - -

THE JUDGE: Have you finished?

MR. KAHN: No, one last item and that is with respect to all of these suggestions which have been made to the Trustee about a Chapter X, I think the Court should know that all of that was part of the original discussion of the Reameco proposal and was part of the Reameco proposal, not anything to do with a Chapter X, which was not even mentioned until it became fairly evident that Reameco was not going to be a successful bidder.

That therefore Mr. Wisehart wanted the opportunity to collaterally attack, in effect, this Court's decision.

Lastly, Your Honor, in view of the fact that we have an administration which is going on daily and the stay will expire at the termination of this hearing, I would now like to hand up to the Court an Order vacating the automatic stay so that the administration of this bankruptcy can proceed pending a

final hearing and determination of the motion presently pending before Your Honor.

THE JUDGE: All right, Mr. Wisehart, go ahead.

MR. WISEHART: Your Honor, I believe I moved to strike Mr. Olick's statements and testimony.

I think the Answer he filed shows it was signed by Mr. A.E. Larsen, who is an employee of the Trustee, therefore not suitable to represent the Debtor in Possession.

I know of no Board of Directors meetings of the Debtor in Possession which would authorize this filing.

I note that Mr. Olick has appeared previously as Special Counsel for the Trustee in this matter.

I support my motion on the grounds that it is ultra virus.

THE JUDGE: I will allow the Answer to stand.

MR. WISEHART: Your Honor, Mr. Kahn referred to the Bankruptcy Act and in

our Memorandum, Pages 34 and 35, we cite ample precedent showing that a Trustee does have authority to be an operating Trustee.

It is specifically stated in Collier on Bankruptcy that, "A Trustee may operate a business as a means of preserving it as a going concern with a view to rehabilitation".

There is nothing in the law which prohibits that.

As a matter of fact, if the Trustee who is a fiduciary to manage the property for the creditors fails to preserve the going value concern of that Bankrupt, he himself is responsible for his failure to do so.

It therefore seems to us and we clearly submit that it is consistent with the precedents that have developed under the Bankruptcy Act, that a Trustee may and should preserve those going concern values by operations and that out of such operations he may evolve a plan for rehabilitation which could result in a transfer to a Chapter X proceeding.

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It is that history of the Reameco plan beginning in February of this year which leads us to think that the Chapter X proceeding now should be instituted in accordance with our request and Petition.

THE JUDGE: Now, as I have already indicated, this matter was remanded to me by Judge McMahon, who is the District Court Judge in charge of the Chapter X proceeding as it is now on file.

My responsibility is to hear and report. I plan to report promptly.

I understand that Judge McMahon is taking on an assignment upstate before the end of this week, so it would behoove me to act promptly.

I do want to indicate what my report will be.

I will give the parties an opportunity to submit proposed findings, conclusions and a proposed Order.

MR. FRIOU: On notice?

THE JUDGE: This is going to be

done very promptly.

MR. KAHN: Should we submit them to Your Honor or Judge McMahon?

THE JUDGE: You will submit them to me.

MR. FRIOU: Notice to us?

THE JUDGE: Yes. Let me finish. I am basing my recommendations on the seven days of hearing that I had, which terminated in July, and resulted in my Opinion dated July 16th.

I am relying on the papers that are before me in this proceeding. I am relying on the argument and proposals and offers of proof which were made and rejected.

All of that will become part of this record. But I am going to recommend to the District Court that it is unreasonable to expect that a plan of reorganization can be effected as a result of the filing of the Chapter X Petition, the Involuntary Petition.

I think I have stated for the record, but I will repeat it, that this organization

was in Chapter XI from February of 1975 through November of 1975.

That it was adjudicated by its inability, in substance, to meet a payroll in November.

While there were constant encouraging prospects for some time during the proceedings, it was clear that in November, if they weren't able to meet a payroll, it was unlikely that any plan of arrangement would come out and further, they were ordered to produce indemnity, which they failed to produce, resulting in an adjudication.

During that period of time, there was no question that they encountered some nineteen million dollars worth of administration expenses.

Since the adjudication, there has been liquidation resulting in the present amount of perhaps six million to seven million dollars, with prospects of more, depending upon and including the hearing that I had on the I.C.C. rights.

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I am also mindful of the fact that Counsel for Reameco did indicate during the course of those proceedings that he offered up at the hearing the original of a Chapter X Petition by Employee-Creditors and that it was an Involuntary Petition.

I am not going to comment on the status of whether or not that handing up was a filing. I don't think it is necessary at this point, since what appears to be a valid filing did take place on September 22, 1976.

However, I am mindful of the fact that Reameco was the unsuccessful contender for the I.C.C. rights and the filing of the Chapter X Petition may well have been motivated by the fact that it lost its contention for those rights.

But all in all I find, and I am going to recommend to Judge McMahon that the Chapter X Petition was not filed in good faith and that it is unreasonable to expect that a plan of reorganization can be effected

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in a Chapter X proceeding.

Mr. Kahn, I suggest that you draw proposed findings of fact, conclusions of law, serve them on Mr. Wisehart and Mr. Friou by tomorrow at 4:00 o'clock.

Mr. Moore, I want a copy of this transcript in my hand by Wednesday morning. I will transmit the whole matter to Judge McMahon for his consideration at that time.

Thank you very much.

MR. KAHN: Your Honor, may I now present the Orders so that the stay will no longer be in effect, until the findings of fact and conclusions of law (handing)?

THE JUDGE: Yes, I will vacate the stay until such time as it goes back to Judge McMahon.

MR. KAHN: Thank you, Judge.

THE JUDGE: I have not acted with respect to the appointment of the Receiver for the reason that if the Chapter X proceeding is dismissed, it is not necessary.

MR. WISEHART: We excepted that

ruling, Your Honor.

MR. ANGEL: If Your Honor please, I just would like to clarify one phase of the hearing.

That is it was my understanding when I met with Judge McMahon and Mr. Wisehart that papers were, if there were going to be any papers, were due to be filed with him on Friday.

Apparently Mr. Wisehart did not understand the Judge as I did, but that was my understanding; that papers would be required by late Friday at the latest.

MR. WISEHART: Well, that is not correct.

THE JUDGE: This is a matter I can't - -

MR. WISEHART: I ask that be stricken from the record.

THE JUDGE: I can't resolve this.

MR. ANGEL: I wanted it to be resolved.

MR. WISEHART: I don't want it in

the record.

MR. ANGEL: If Your Honor please, he said Judge McMahon did not make a direction.

I think I was the one who had to reply because I was the other one present.

THE JUDGE: Mr. Moore, the last colloquy, strike it from the record.

If you want to renew this before Judge McMahon, do it.

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February 1, 1976

TO: C. ORVIS SOWERWINE

FROM: TOM KOLE

AN EXPRESS COMPANY

As I view the situation, (as the former Chief Executive Officer of REA and the Vice President of Marketing for a major, profitable truck line prior to that) any person(s) who would undertake the reconstruction of a nationwide express service would -- at this point in time -- have at least five (5) strong, distinct advantages in their favor:

They are --

(1) Market Need -- The ultimate acceptance by the shipping public and the governing regulatory agencies that there is a tremendous need for an organization specializing in the handling of shipments primarily below 500 lbs. from and to the metropolitan and rural areas of the nation.

The truckers cannot do it in an economic fashion and UPS does it in a restrictive, cream-skimming fashion.

(2) REA's Extensive Operating Authority -- While this might well encompass a legal definition and regulatory clarification, there is little doubt that REA has operated on the surface, since the days of the pony express, stage coaches, canal barges, etc. from and to all corners of the United States -- and was the first company to carry packages in the air, even before the escablishment of the Interstate Commerce Commission and the Civil Aeronautics Board.

In recent years, REA has operated intermodally, interstate, domestically, internationally and on an intrastate basis, serving even the remotest of points, handling shipments that ranged from 1 lb. packages to 20,000 lb. aggregates to 40,000 lb. single bill truckloads. In addition, since July of 1975 it has operated a Special Commodities Division (REXCO), whose tariff was approved by the Interstate Commerce Commission, over the objection of all major motor carrier rate bureaus and specialized haulers.

(3) No Labor Contract and a Sympathetic Labor Leadership -- The Courts have dissaffirmed the labor contracts between REA and the Brotherhood of Railway, Airline & Steamship Clerks and the International Association of Machinists -- but more importantly, both labor unions now recognize the need for the creation of jobs and the importance of flexible work rules and conditions that will allow the express company the necessary service "edge" over competition that is essential to continued growth and the creation of more jobs.

In my judgment, there has never been a more propitious time to avoid the costly, burdensome practices that plague most of the industry -- nor is there a better time for the acceptance of productivity incentive, etc. In order to facilitate this, however, I strongly urge that the ran and file be allowed the opportunity to share in the ownership of any new company.

(4) Sympathetic, Cooperative, Governmental Climate

The "unbelievable" transaction of appointing a Trustee for the liquidation of a traditional American institution was, unfortunately, in my judgment, the only way that the members of the Senate and Congress could truly come to appreciate the importance of the service provided by REA -- and the contribution that its employees make to the American economy.

The current attitude in Washington is conciliatory, albeit businesslike. The climate is one in which a properly organized plan -- which could involve government guaranteed loans, is entirely feasible if acted on within the near future in close coordination with the labor organizations, particularly the Brotherhood of Railway, Airline & Steamship Clerks. Legislation enabling this action is currently pending.

In my judgment, the Department of Transportation, the Interstate Commerce Commission and the Civil Aeronautics Board would respond favorably to any such undertaking. Further, the railroad lobby would assist, if the Express Company would work in conjunction with Conrail and/or Amtrak. I believe that such an undertaking, combined with major shipper support, would overcome the anti-REA trucking interests.

(5) Ability to Control Financial Exposure -- It is apparent that the I.C.C. would expect that any new undertaking would encompass a truly express operation, i.e. nationwide, wide range of commodities, etc.

This, however, could be accomplished in reasonable, well-organized stages -- step-by-step using the current REXCO (Special Commodities) operation to provide some cash flow in the interim. Proper selection of markets and support facilities, equipment, etc. on a leased basis would allow sensible re-entry into the market as conditions warrant.

At the same time, arrangements could be worked out either with Conrail -- or a small non-competing group of railroads, who cover the country -- for REA to be the single underlying pick-up and delivery carrier of piggyback traffic. Receiving stations -- where freight would be consolidated -- for surface and air could be established in those markets with greatest potential -- on an "as supported" basis.

This could all be part of a master plan, which would delineate proposed operations, time frames, etc.

Significant Facts Regarding the Operation of REA Express, Inc.

(A) Viability -- Since REA has filed bankruptcy it has become the vogue to join the ranks of self-appointed "fall safe" experts and assume that it cannot be a profitable operation. This is especially true when voiced by truckers who do not have the desire, nor in many cases, the innovative ability to change their own operations in order to profit from small shipments (500 lbs. and below). The fact of the matter is that REA did make a pure, unadulterated operating profit of $27 million in the calendar year 1974. This was four years after it experienced a loss in excess of $43 million -- and absorbed a 39% labor wage increase in the interim.

This data, coupled with the information that the massive United Parcel Service, whose shipments averaged approximately 12 lbs. (compared to 110 for REA) and whose average revenue per shipment is approximately 50% of REA's -- consistently garners a very handsome profit, should startle even the most mediocre student of transportation economics, into the realization that an express operation, properly planned and financed can indeed be very viable.

REA's problem, contrary again to the easily coined phrase of "uncontrolled labor and poor management" was one of inadequate financing -- under-capitalization! Presuming such funds to be available, the answer to viability -- to continuous profitability, is one of simplicity and specialization.

The United Parcel Service operation is the classic in this field. Their entire operation reflects an engineering of equipment, facilities, billing procedures, etc. to the freight that they select to handle, via tariff design and it allows them to provide top-flight service at rates that reflect their efficiency.

Their traffic is limited in size and weight (50 lbs. per piece) to accommodate to its conveyor operation and to be handled by the driver without expensive equipment -- or a helper. The freight moves only prepaid so they have little or no difficulty of cash collection upon delivery and they work on the shipper's money. They unload a 45-foot trailer in less than 45 minutes and move the freight across the dock via mechanized conveyors to delivery units. The motor carrier on the other hand takes eight to twelve hours to unload a similar size trailer and "floors" and rehandles the traffic -- and does additional paperwork duties to control the traffic. UPS does not.

UPS' shipments are listed on a simple manifest by the shipper and the shipper applies Pitney-Bowes postage meter type stamps to the cartons. There is no complicated motor-carrier type commodity related rating system -- so it can be data processed -- eliminating the trained rate clerk and the eight to ten part waybill cut by a motor carrier.

The over-the-road trailers are designed for maximum cube utilization (drop-frame) and they never have to worry about fines for overloads because of their particular traffic density. Such units can be hauled by lower-geared tractors with less horsepower -- and obviously less maintenance costs and tire wear.

Their city pick-up and delivery trucks follow a similar engineering pattern -- depending upon the area to be served -- but are usually step-vans, rather than the truckers' 28 to 30-footers, which force the driver to get out of his cab, climb up into and out of -- at each delivery.

Their drivers average over 50 stops and the motor carriers about 16. We averaged approximately 25 in 1974. UPS' drivers generally do not have to wait in long lines in alleys leading to receiving platforms. They deliver through the front door, the office facility or through special receiving areas. I would also presume their injuries to be less because of the easier-to-handle, lighter-weighted traffic that their dock people and drivers work with.

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While there are other related efficiencies, this should serve to describe the areas of opportunity available to individuals interested in designing a profitable small shipment operation. REA need not limit its tariffs as rigidly as UPS -- but its base operation should follow the same concepts as they use.

On the other side of the coin, the motor carriers have chosen to reduce their losses on shipments below 500 lbs. through rate increases and the elimination of service to specific areas and/or accounts.

The motor carriers are "saddled" with terminal facilities and equipment (fork lifts, etc.) necessary to handle the very profitable, but limited and cumbersome shipments, weighing 1,000 lbs. or more. The heterogeneous mix of traffic that they solicit does not lend itself to simple mechanization, unless the operations are separated. Almost all attempts to mechanize the handling have failed -- because none of them have yet chosen to truly separate and specialize on the smaller shipments. The industry posture has been to generally increase the rates to overcome their inefficiency or lack of desire to commit capital expenditures in such an effort. In addition, until recently, the I.C.C. was not receptive to, or understanding of, the economics of small shipments. Today, they are sympathetic to the motor carriers' pricing approach and have therefore eliminated the incentive for motor carriers to improve handling of small shipments.

The contradiction here, however, is that over 70% of the total shipments and billions of dollars moved nationally in surface transportation weigh less than 500 lbs., so that in terms of terminal operations, equipment and administrative techniques, they have the "tail wagging the dog."

A review of the consistently profitable trucklines will show that they have tariffs, marketing and sales programs that encourage higher-weighted, longer haul traffic -- discouraging small single-shipment pick-ups. The exceptions are those few companies with extremely rigid city driver controls and/or pick-up and delivery service areas of moderate congestion.

At REA, we saw the opportunity to combine the efficiencies of a UPS and the knowledgeable truckers and have the "shipping world as our oyster" -- I believe that opportunity still exists -- and, in fact, the ability to accomplish it, properly financed, greater than it has ever been.

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(B) Terminal Areas Authority -- The Express Company is not subject to Ex Parte No. MC-37 which defines and limits common carrier pick-up and delivery areas.

In past hearings, the Interstate Commerce Commission has ruled that REA may define its Express Terminal areas through tariff publications filed with the Commission (Ex Parte No. 242, Express Company Terminal Areas 332, ICC 91, 118 (1967)).

This case was contested by the American Trucking Association -- all the way to the Supreme Court -- and it was upheld.

The Express Company therefore has the unique marketing and operating advantage of accommodating its terminal areas to its freight flow and ever-changing market circumstances (i.e. suburban shopping centers, new industrial parks, etc.)

(C) Piggyback Potential -- With ever-increasing fuel costs and spiraling wages of over-the-road drivers, an Express Company can and should capitalize on the predictable diversion of truckload traffic (20,000 lbs. and above) to the more efficient, less costly long-haul piggyback trains.

It (an Express Company) under Part I of the Interstate Commerce Act can negotiate its line haul rates -- individually with the respective railroads.

It would not only compete with its own REXCO operation but provide a natural conduit for the transfers -- pick-up and delivery of piggyback trailerloads solicited by the railroads. In this capacity, it could control costs, improve coordination and dictate schedules of loading and unloading -- all steps that would improve customer satisfaction.

(D) REXCO Operation

This is a special commodities express operation handling only truckload traffic, hauled by drivers who are represented by the Brotherhood of Railway and Steamship Clerks.

The loads are moved under REA Tariff 85, which is a mileage tariff limited to specific commodities. The solicitation is done through agents. The operation is coordinated by the manager of the division and none of the traffic is -- or should ever be -- handled at an REA terminal.

The drivers are required to maintain logs and conform to all applicable state and DOT laws and regulations. They are compensated on a percentage of revenue basis which depends upon whether they merely provide the tractor, or both tractor and trailer.

Customer response to this operation has been overwhelming. The fair and equitable rates, combined with outstanding service should insure continuous growth.

(E) General Operating Authority -- REA's motor common carrier authority to transport "general commodities moving in express service" is closely analogous to motor common carrier authority. REA has never been restricted in handling any shipment due to commodity, size, weight, or other transportation characteristic. On many occasions, in response to protests or complaints by carriers or carrier groups, the Commission has refused to place a weight limit or size limit on REA's authority. The issue was settled in I.C.C. Docket No. 33977, Freight, All Kinds L.C.L. Container Charges -USA, 323 I.C.C. 468 (1974).

The Commission further held in the Arrowhead Freight Lines Case of 1955 that an Express Company --

-- must hold out and have the ability to transport any commodity which may be safely transported in van type equipment.

-- must provide the care and security which the involved commodities require.

-- must provide equally expeditious transportation and careful handling of all shipments.

-- should conduct actual operations on a regular route basis; and

-- that the tariff must be simplified.

It should be noted that while the commodity must be one that could move in van equipment, it does prohibit the movement of such traffic in flat bed equipment if the carrier's convenience would best be served by doing so. In any event, the Express Company as a matter of practice moved truckloads for years -- and as recently as 1972 has moved over 90% of its surface traffic over-the-road.

(F) Hub Authority -- The Hub authority was the handicraft of the past management. The railroad owners only applied for motor carrier routes for traffic that could not move on rail.

The restrictive and costly and less-service sensitive hub authority was proposed in order to support the rail route

structure of the then owners and was reviewed and approved (temporary authority) by the Interstate Commerce Commission. The ICC certainly should have recognized that basic piggyback oriented routes could in no way allow the agency to provide true "express" service which was comparable to either current-day competition or that which was available through the use of express cars of the expansive passenger train system of yesteryear.

The railroads themselves (hopefully guided by the ICC) should have "risen above" their inherent, natural bias against trucks and applied for easily, justified nationwide, grandfather rights for over-the-road operating authority.

Instead, as recently as 1959, their approach to the situation left them without authority in three states -- did not include <u>any</u> authority connecting towns of 20,000 population or more in twelve states and included very little motor carrier authority west of the Mississippi River. Even their <u>final</u> attempt at the so-called hub approach, did not permit motor carrier service between many major cities west of the Mississippi -- (in order to have "captive" piggyback traffic). This "band-aid upon band-aid" approach was reviewed and approved by the ICC -- who it seems should have recognized it was sanctioning the suicide of express service -- and therefore the company.

New management, who was truly intermodal oriented, proposed a total revision to this system and was denied that opportunity because irregular route authority did not theoretically respond to an out-moded and archaic administrative definition of "express."

This is a course that should be aggressively re-pursued. Interestingly enough, the most efficiently operated small shipment carrier (UPS) operates with irregular authority and the energy crisis of last year caused many regulators to suggest that this is the most economic method of road transport.

(G) <u>Security Clearance</u> -- REA was the only nationwide handler of secret and classified documents under a special Department of Defense Clearance.

REA provided armed-guard and protective signature services for high-value shipments.

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(H) Air Express Service -- Air Freight Forwarding -- International -- REA moved the first air-cargo shipment in 1927 and provided the pick-up and delivery of all Air Express shipments -- by partnership agreement with all major airlines, approved by the CAB (since the mid-thirties)). This agreement insured REA of priority boarding of all shipments -- immediately after baggage and U.S. Mail. This service was unique in its (a) handling characteristics; (b) the broad range of commodities transported; and (c) its extensive geographical coverage; and (d) its priority loading advantage. Most significantly, the traffic moved in passenger planes -- not in cargo aircraft.

This service can be extremely profitable to both the airlines and REA -- and extremely economical to the shipping public -- particularly if the airlines and the CAB can be convinced that the traffic truly moves in its baggage compartments at incremental costs.

Just prior to REA's filing of Chapter XI, 22 of the airlines and REA signed an agreement, that in my judgment, would have been beneficial to all parties, particularly the shipping public. While the CAB did not approve the agreement, the airlines have not as yet created the CAB requested replacement service so I believe the opportunity to reconstruct such a service -- but only with strong airline and shipper support -- still exists. The climate and organization of the CAB has also changes -- which should prove helpful.

Failing that, REA has been granted the opportunity to become an air freight forwarder and properly planned, manned and phased (with appropriate financial support) can become a profitable freight forwarder.

(I) Air International -- REA attempted to enter the International cargo market with extremely limited funds -- and because we could ill afford the cash drain, closed down the operation. There is profit potential in this area but it is highly dependent upon the nation's economy and should be approached cautiously. You must recognize, however, that the growth potential is relatively limited.

REA did operate as an IATA Agent and it would be reasonable to assume that this profitable service could be re-instituted.

(J) Customs Brokerage -- REA had the most extensive customs brokerage operation in the United States. It performed the administrative and documentation functions related to importing and exporting of traffic. This very profitable service could be re-instituted and manned in a short period of time.

(K) Fast Service Shipping Terminals/Consolidation -- This operation performed the receiving and consolidation of traffic tendered to it. It allowed the shipper "savings" for delivering the freight rather than having it picked up and allowed the customer to take advantage of the savings discount of the aggregate rates offered by REA.

Again, we were unable to capitalize on its potential because of limited funds. This service should be merchandised -- particularly in areas such as the garment district -- to combat UPS. Freight consolidated in this operation should not be moved exclusively via REA. It should be moved the most expeditious, economical way consistent with the customers' needs (Intermodal Express).

Fast Service could act as a receiver and/or consolidator for surface or air freight forwarders, truckers, shippers' associations, etc.

A tariff should also be designed that allows the consignee to save by picking up his freight at the destination terminal.

CONCLUSION

REA can truly be the super-market of transportation. Its range of service is unlimited -- from warehousing to packaging to pricing, assembly, distribution, courier service, etc. -- "you name it," . . . and this can be done through franchising or through normal organizational channels. The basic elements are here to be exploited.

Orvis Sowerwine From R. Miller Subject Inaugura. n of Express Operation Date 3/25/76

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REA Express Memorandum

Referring to our several discussions in connection with the feasibility of you, as Trustee, starting up an express operation.

As I understand the situation, the inauguration of a new "express operation" would serve a two-fold purpose: (1) To protect the operation of the Rexco Division and (2) To eventually create a profitable operation in the so-called small shipment field in which there is a transportation void as a result of REA going out of business.

There is no question that there is a real need for this type of service nor is there any question in my mind that an express operation can be reinaugurated with a minimum capital investment.

Marketing and Sales

From a marketing standpoint I think it would be important, as you suggested, that a preliminary contact be made with some of REA's former National Account customers who were always sympathetic to our cause. This includes such companies as J. C. Penney, Cluett Peabody, Spiegel's, Aldens, Sears Roebuck, Montgomery Ward, and American Home Products. The purpose of the contact, of course, is to determine how much support we could receive from such customers and, secondly, to determine where the greatest need exists for this type of service in the start-up phase.

Consideration should be given to doing business in the 50 to 500 pound range which is what REA's former Tariff 100 was geared for. I think this tariff could and should be used with some possible minor alterations. There are portions of REA's Tariff 33 which also should be considered in the marketing program. These tariffs will attract primarily the 50 to 500 pound shipments. It would be well at this point to also consider the feasibility of getting into the so-called package delivery business which is now monopolized by UPS and the Post Office. Properly handled this can

be a profitable field, particularly if paperwork is kept to a minimum, with each package considered a separate shipment and a very simplified stamp-type system, all on a prepaid basis.

The marketing concept should consider the possibility of a tariff structure which would segregate pickup and delivery charges. This would permit a more economical rate for "over the counter" business, a separate rate for pickup and delivery provided in industrial areas as opposed to a higher pickup and delivery rate for traffic picked up and delivered in outlying areas.

Finally, in order to be classed as a true "express company" consideration should be given to establishing compensatory rates for "exotic" type traffic such as live animals, high value traffic, dangerous articles, etc.

It would of course be extremely important to inaugurate an intensive sales campaign, not only through an advertising program, but by personal contact. Therefore, it would be important to have at least one salaried employe at each city location to do the sales work and also monitor the service being performed by whoever is selected as the pickup and delivery drayman.

Operations

This service could be started in as few as two city locations which, of course, would require the least amount of capital investment. In the event additional capital could be obtained then the operation could be started on a larger scale.

Upon selection of the points involved it would then be necessary to secure people to perform pickup and delivery service on a commission basis. This can be done by contacting existing draymen and working out an arrangement on a contract basis. It would also be possible to contact individuals, possibly former REA drivers who might be interested in an "owner-operator" type pickup and delivery arrangement on a commission basis. Naturally the number of people required at each location would depend entirely upon the amount of business available and the area to be covered. Cities such as Atlanta and Chicago would certainly require more than one person to begin with if any semblance of

service is to be provided. I think it would be possible to secure people to perform this service at not to exceed 20% of the revenue at origin and also 20% at destination.

In order to have a place of business available it would be necessary to secure what was known as a "Branch Agent" in the old REA operation. We tried to secure moving and storage people who acted as our agent also on a commission basis where shipments to be picked up by the consignee could be temporarily stored, where outbound traffic brought in by a customer could be handled and where phone calls for service and information could be handled and pickup calls dispatched. This also could be arranged on a commission basis and when the operation finally became large enough consideration could be given to an exclusive terminal.

Intercity line haul could be performed by the Rexco Division when practical but consideration should also be given to the use of Amtrak, bus service and piggyback. Amtrak does have a useful service with the possibility of negotiating attractive rates. The bus companies are in a position to provide a service to and from smaller communities where necessary.

Accessorial Services

Not too long ago Conrail was extremely interested in using REA for handling piggyback trailers over the road to and from piggyback yards. Now that the Conrail bill has been passed and approved it would be possible in my opinion to create another source of revenue by working out an agreement with Conrail to perform these services. We are the logical people to do the work because of our ~~exclusive~~ [illegible] operating authority.

It would also be possible to start up an air freight forwarder operation at the same time that a surface express operation is inaugurated point by point. In my opinion if the start-up only contemplated service between two cities it would also be possible to simultaneously start up the air freight forwarder operation between the same cities.

Ray Miller

R. R. Miller
Vice President, Field Operations.

WISEHART, FRIOU & KOCH

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PRIVILEGED & CONFIDENTIAL

May 6, 1976

C. Orvis Sowerwine, Esq., Trustee

On April 13, 1976, you asked me to advise you concerning a possible conflict of interest you have in acting as Trustee of REA Express, Inc., a bankrupt. The question arises out of the fact that Shearson Hayden Stone, Inc., of which you are an officer, has acted in the past as a consultant to various railroads throughout the United States, and continues both to act and to seek to act in that capacity. The fact that Shearson Hayden Stone, Inc. is consultant to Missouri Pacific in connection with the proposed merger with Southern Railway indicates the importance of the work being performed. We have not been told the amount of the consulting fees from that source, nor do we know whether your firm acts, or seeks to act, in similar capacities for other transportation companies with interests which are or may be adverse to REA's survival or revival. If you desire that we examine the facts more closely, we shall be glad to do so.

We think it must be assumed that a substantial possibility exists that, if the issue were raised, it would be decided that a conflict does exist.

Our opinion is based in part upon your own statements, made before third parties, that you yourself believe there is a conflict, notwithstanding oral advice to the contrary given by other lawyers. We believe that such oral advice would be accorded little weight because (a) such advice apparently was not the result of a considered opinion based upon lengthy reflection nor upon research into the facts and the law, (b) the lawyers giving such advice themselves are subject to a charge of a similar conflict of interest, and the advice therefore is in danger of being regarded as self-serving, (c) your own credentials as a leading corporate lawyer would cause great weight to be given to your view that a conflict does exist, (d) the belief that a conflict does or may exist itself exposes fiduciary conduct to be questioned on the ground that it was with knowledge rather than inadvertent, and (e) the charge of conflict of interest is most likely to be made in the context of a hindsight challenge with respect to some action which dissatisfied parties might be able to extablish was prejudicial to their interests.*

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*For the record, we wish to note that this firm is a creditor; that Arthur M. Wisehart was a former officer, director and stockholder of REA. The firm represents interests which may have occasion to complain about action taken by you as Trustee, circumstances which were known to you at the time the opinion was requested. For these reasons, you may wish to seek other advice on this subject but, our opinion having been requested, and with your disclosure regarding your belief that a conflict exists having been subsequently made openly in the presence of this client, we feel obligated to advise you promptly concerning our views in any event.

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1. Disclosure - When an apparent or actual conflict of interest on the part of a fiduciary exists, disclosure is a minimum requirement. In bankruptcy proceedings this is borne out by General Order 44 concerning appointment of attorneys - A fortiori trustees have an equally high or higher standard of disclosure to meet. Disclosure in such a case would be required to all affected by the conflict. Thus disclosure merely to Judge Galgay, for example, would be ineffectual; a written notice to all concerned would be essential. The problem is, however, that such disclosure in itself, while it might alleviate the problem in the context of your appointment and continuation as a trustee, would not in itself estop others from using conflict of interest as the basis of challenging specific actions as a trustee. Disclosure we believe can create an estoppel only when coupled with full details concerning the specific action taken which might be affected by the conflict. Supplying such details as to any and all such actions on a continuing basis would seem to us to be a practical impossibility.

2. Resignation from Shearson Hayden Stone, Inc.

This would not solve the problem with respect to your appointment as Trustee and actions taken to the date of resignation. Future actions would still be subject to attack particularly because of the impossibility of purging the effect of the prior association despite the good faith involved in the efforts to do so.

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3. Resignation as Trustee

This would not remove all risk for past actions but should substantially reduce the risk in many of the actions which are likely to be most controversial and which lie in the future.

* * * *

It is quite clear on the authorities that full disclosure to all creditors and others who might be affected by your decisions is an immediate requirement. Prudent steps leading to your resignation as Trustee would also be advisable, in our opinion.

There is a question as to whether even full disclosure could be effective as to conflicts of interest involving litigation. See Cinema 5, Ltd. v. Cinerama, Inc., et al., (C.A.2) Jan. 27, 1976. In this context, we note that a bankruptcy proceeding itself constitutes litigation and that, for such purposes, a trustee functions as an officer of the court. With the present trend toward strict standard evinced by Cinerama, we think it should be assumed that a trustee will be held to the same standard as a federal judge. It is pertinent that the Canons of Judicial Ethics Section 12 state:

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> "Trustees ... and other persons appointed by a judge to aid in the administration of justice should have the strictest probity and impartiality and should be selected with a view solely to their character and fitness."*

In this standard, if so, there would be little question but that the situation involving Shearson Hayden Stone, Inc. would be regarded as a disqualifying conflict.

We believe that resignation as Trustee is the advisable course having in mind also the circumstances, previously brought to your attention, involving the original selection of the Creditors' Committee and yourself as Trustee by creditors who were competitors of REA and against whom REA has claims which substantially exceed their total claims against REA. In the Chapter XI and bankruptcy proceeding, it has become apparent that employees and former employees may be the largest class of creditors both numerically and in terms of the total value of their claims. On the other hand, these creditors may

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*See Also Mosser v. Darrow, 341 U.S. 267,271 (1951)

> "A reorganization trustee is the representative of the court and is not contended and would not be arguable that if he had engaged for his own advantage in the same transactions that he authorized on the part of his subordinates he should not be surcharged. Equity tolerates in bankruptcy trustees no interest adverse to the trust. This is not because such interests are always corrupt but because they are always corrupting. By its exclusion of the trustee from any personal interest, it seeks to avoid such delicate inquiries as we have here into the conduct of its own appointees by exacting from them forbearance of all opportunities to advance self-interest that might bring the disinterestedness of their administration into question." (Opinion of Mr. Justice Jackson).

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well feel that their interests have been given but little weight in the Chapter XI proceeding, in the determination to request adjudication, in the refusal of additional time for the development of a proposal by them to avert adjudication, and in the administration of the bankrupt estate. Therefore we suggest that, as part of a prudent plan involving your resignation as Trustee, the Bankruptcy Court should schedule a new election of creditors' representatives, giving due notice to all concerned, so that a new trustee can be validly chosen as a representative of the majority in interests of the creditors.

From a personal point of view, we would very much regret such action, having in mind our friendship over the years, our prior association together in the same firm, and the working relationship which has been established more recently in connection with the REA bankruptcy, but we know that you want and expect, and are entitled to receive, our best thinking of the subject.

R.E.F.

215 East 42nd Street
New York, New York 10017

TELEPHONE
(212) 557-8[illegible]

PRIVILEGED &
CONFIDENTIAL

May 11, 1976

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C. Orvis Sowerwine, Esq., Trustee

This discusses some of the points you raised in commenting upon the conflict of interest issue raised in my memorandum of May 6, 1976.

The need for a new determination with respect to the representatives of the creditors arises not only out of the conflict of interest problem, but also because of the railroad/airline domination of the Creditors' Committee, and of the choice of those involved in the administration of the bankrupt estate. The pre-Chapter XI transportation claims of airlines and railroads total approximately $7 million (plus an additional disputed $2.2 million claim of Penn Central, reflecting the real estate tax component of certain leases). These claims are involved in pending litigation, and may be subject to substantial set-offs or counterclaims. The notes held by the railroads are involved in separate litigation and as far as we know do not form the basis of separate claims in the Bankruptcy Court. They, too, may be subject to substantial counterclaims in the nature of set-off and recoupment. On the other hand, the pre-Chapter XI claims of employees, vacations earned but unpaid, total approximately $11 million. As far as I know, the validity of these claims is not being challenged.

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The same pattern exists as to claims for Chapter XI administration expenses: the claims of the railroads and airlines total under $2 million and, once again, the liability would be affected by pending litigation in which REA contends that these claims were excessive and subject to set-off. On the other hand, the Chapter XI administration expenses reflecting employees' claims could run in excess of $14 million according to the Price Waterhouse analysis submitted to the court on April 2, 1976, as high as $11 million (over $2 million of which represents deferred payroll withheld and holiday pay) if the date of rejection of the labor agreements is held to be May 19, 1975. Although these claims are in issue in litigation, it is our view that the employees would have substantial quantum meruit claims notwithstanding the result in the pending case.

Thus the claims of the employees appear to preponderate in both the pre- and post-Chapter XI periods, and those in the pre-Chapter period are not being challenged. The policy of the Bankruptcy Act is to protect the claims of wage earners. No doubt this is because they generally need protection; with less at stake individually, they do not have available to support them the corporate treasuries and law firms representing large creditors. Some of the employee claims for vacation pay may be entitled to priority. An opinion on the priority status of the vacation pay claims had been requested from Anderson Russell Kill & Olick during the debtor-in-possession period; as far as we know it was not given. But the Bankruptcy Court may well be

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expected to have some solicitude for the interests of employees, and concern that the administration of the bankrupt estate had conflicting interests favoring certain classes of claimants, contrary to the interests of the employees.

I stressed in our earlier discussion that the conflict relates not only to the adverse positions in litigation of REA and the railroads and the airlines dominating the organization of the Creditors' Committee, but also to the fact that they were REA's competitors in the market for transportation services. You indicated a lack of knowledge of the competitive aspect. This is a material fact which should be further explored as the information available to you is not sufficient to permit a judgment on the issue to be formed. A competent economist can provide a market analysis. Dr. James R. Nelson of Amherst would be the logical candidate to advise you because he has previously studied the competitive relationships involving both surface and air express, and is also highly regarded by the Association of American Railroads and the Postal Service, having been retained by those organizations in a consulting capacity. Another possibility would be Anthony F. Arpaia, Esq., former Chairman of the I.C.C., and a Vice President of REA during the period of railroad ownership. Mr. Arpaia also has acted as a consultant to REA following the railroads' sale of the company, and is very knowledgeable about REA's role in both air and surface transportation. I am informed that the competitive relationship with the railroads was attributable inter alia

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to (a) the large number of the railroads which established their own trucking subsidiaries competing directly with REA for business, (b) the fact that the railroads were necessary links in the piggyback business of the forwarders who handled LTL shipments, such as those hauled by REA,* and (c) the more recent expansion of certain railroads such as Burlington Northern into air freight forwarding in competition with Air Express.

Competition with the airlines is based upon the fact that they (a) had established their own separate air freight businesses, in competition with Air Express, (b) had established their own pickup and delivery subsidiary Air Cargo, Inc., and (c) were promoting their own separate priority services prior to adjudication.

The problem which you cannot get rid of by resigning from Shearson Hayden Stone, Inc., is that because you were chosen by the Creditors' Committee, an adverse inference may be drawn that you were chosen to serve the interests of the railroads and airlines and not of all of the creditors. Thus you have "prejudicial associations." See Collier's on Bankruptcy, 14th Ed. ¶ 44.07. This together with the conflict arising from the Shearson Hayden Stone relationship is the nature of your divided loyalty as I see it and why I feel that your resignation as trustee is the most prudent course.

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*As an indication of the competitive relationship, I am informed that there is substantial direct evidence that the forwarders and the railroads conspired to fix prices charged by REA while it was still owned by the railroads.

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I gave you a copy of the 1974 Hess Lecture given at the City Bar Association by Dean Russell Niles. The lecture itself covers the development of "the fiduciary principle" over a broad spectrum, and is helpful in presenting the best compilation of materials I have found.

Further, because of the experience he has had in conflict of interest matters, and his well-known objectivity, Professor Oppenheim, who is of counsel to this firm in connection with REA's major litigation, was consulted on the memorandum previously given you, and is in accord with its conclusions. If you desire to discuss the matter with Professor Oppenheim, he is available for that purpose.

My view is that as bankruptcy trustee, you have an a fortiori situation to that involving private trustees in the lecture by Dean Niles. You have to meet standards of freedom from conflict as high as those which have to be met by the Bankruptcy Judge because you are an integral part of the litigation process. Otherwise the system has a fatal flaw. Generally, the bankruptcy administration proceeds on an ex parte basis with the judge relying almost completely on the trustee's representations. Other parties are frequently not actively involved. Thus, if the trustee has a complex of apparently entangling loyalties, including loyalties arising out of past associations, the entire decision making process of the Bankruptcy Court becomes tainted by conflict of interest.

Robert E. Peirce

R.E.P.

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S. CHESTERFIELD OPPENHEIM
THE DIPLOMAT APARTMENTS, P 306
2440 VIRGINIA AVENUE, N.W.
WASHINGTON, D.C. 20037

May 11, 1976

CONFIDENTIAL

MAY 13 1976

Arthur M. Wisehart, Esquire
Wisehart, Friou & Koch
Sixth Floor
219 East 42nd Street
New York, New York 10017

Dear Mr. Wisehart:

This certifies that I have read with great care the privileged and confidential memorandum of May 6, 1976, to C. Orvis Sowerwine, Trustee, signed by Robert E. Friou, a partner of your law firm. I concur fully in the views expressed in that memorandum.

Sincerely yours,

S. Chesterfield Oppenheim

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In Re : 75 B 253 (JJG)

REA EXPRESS, INC., f/k/a Railway Express Agency, Inc., : MEMORANDUM IN RESPONSE TO MOTION

Bankrupt. :

- - - - - - - - - - - - - - - - - - - -x

Preliminary Statement

This memorandum is submitted in response to the motion returnable June 16, 1976, concerning the proposed retention of the firm of Windels & Marx as special counsel. As stated in the Notice of Motion dated May 26, 1976, the purpose of the proposed retention is "to represent the Trustee and the bankrupt's estate in connection with rendering an opinion letter to the Trustee and the court with respect to a charge of conflict of interest made by Wisehart, Friou & Koch, Esqs. special counsel to the Trustee . . . ."

The motion and supporting application were made by the firms of Whitman & Ransom and Marcus & Angel, bankruptcy counsel to the Trustee.

It is our understanding that said motion was served upon this firm at the direction of the Court. We therefore submit this memorandum in the belief that the Court desires that our views be presented on the issues raised by the instant motion.

DISCUSSION

I. Factual Clarification

The application in support of the motion fails to state that the memoranda by this firm on the subject of conflict of interest were in response to the Trustee's request that, as special counsel, we provide such an opinion. Further, we have been informed by the Trustee that the decision to ask this firm for its opinion had been concurred in, and indeed suggested, by his bankruptcy counsel.

The application also fails to disclose that the Trustee, contrary to the conclusions reached by his bankruptcy counsel, had himself concluded that a conflict exists, and had disclosed that conclusion to third parties.

Thus, the so-called "serious charges" referred to in paragraph 7 of the application are not simply "charges" but the conclusions reached by this firm in response to the Trustee's request for an opinion, and are consistent with his own conclusion that a conflict of interest involving him does exist.

Paragraph 6 of the application refers to this firm's memoranda of May 6, 1976, and May 11, 1976. Because of the importance of the matter, acknowledged in paragraph 7 of the application, specific references to said memoranda in the application, and the misleading nature of the assertions in the application, we believe that said memoranda should be made a part of the record herein. Copies are annexed hereto as

Exhibits A and B.*

The firm referred its conclusions to Professor S. Chesterfield Oppenheim, Esq., with whom it has an Of Counsel relationship in connection with REA's pending major litigation. Professor Oppenheim, who is a leading expert in the field of antitrust and trade regulation law, has made a special study of conflict of interest questions. Professor Oppenheim concurred fully in the memorandum of this firm dated May 6, 1976, as is shown by the letter annexed hereto as Exhibit C.

Based upon the foregoing, it appears that the opinion which the motion seeks to have produced has already been provided.

II. Procedural Considerations

The instant motion seeks retention of Windels & Marx to act as special counsel representing both the Trustee and the bankrupt's estate. This would give rise to a duality of representation which would be inadvisable. The Trustee's personal interests as

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*We were informed on June 11, 1976 that the memoranda have been transmitted to the Bankruptcy Court with a covering letter (a copy of which was not supplied to us). In these circumstances, we have concluded that they are properly to be regarded as public documents. Originally, we thought that the Trustee might want to obtain further advice of his own on the subject, as noted on p. 2 of our memorandum of May 6, 1976, before determining upon his future course of action. We did not contemplate at the time that our opinions would be made an issue in a motion filed with the Court. Previously, when we sought to raise the conflict issue involving bankruptcy counsel, they took the position that we lacked the standing to do so. Now that bankruptcy counsel have themselves made this a matter of judicial cognizance by the instant motion with its misleading attack on our opinions, we believe that a judicial determination is needed to put the matter to rest in the best interest of the bankrupt estate.

Trustee and the interests of the bankrupt estate are not the same on the conflict of interest issue, and they should not be joined in single representation by one firm.

Further, those involved in an asserted conflict of interest should not put themselves in the position, no matter how inadvertently, of telling this Court who should be chosen to advise it (the motion states that the "opinion letter" would be rendered "to the Trustee and the court" (emphasis added)), as to a determination which the Court alone can make.

The firm of Windels & Marx is well-known, and of good standing. However, the choice of additional special counsel by those about whom the conflict issue has been raised in a prior opinion not to their liking could create an adverse impression of opinion shopping. Fundamentally, moreover, one has to consider whether another opinion from another firm will put the issue to rest, and the answer clearly is no; only a judicial decision can have that effect.

III. The Need for a Judicial Determination

The need for a determination by this Court is underscored in our view by a serious question of whether the administration of the bankrupt estate reflects the interests of a majority of the creditors. The conflict of interest issues raised with respect to the Trustee, bankruptcy counsel, and the Creditors' Committee involve railroads and other carriers which competed against REA and against whom REA has substantial claims. On the other hand, the claims which those carriers may have against REA as creditors in large part are (a) disputed,

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(b) involved in litigation, and (c) less in amount than REA's claims against them. For example, millions of dollars are claimed in damages by REA against railroads which are involved as defendants in REA's major litigation. However, certain railroads (Burlington Northern and Chicago, Rock Island), in the guise as creditors with the active involvement of railroad counsel, who later became first counsel to the Creditors' Committee and later, bankruptcy counsel, took the lead in organizing the Creditors' Committee out of which the administration of the bankrupt estate later evolved. Of the eleven-member Committee, six were airlines (one airline member subsequently resigned), and one was another leading railroad (Penn Central).

IV. A Judicial Determination of the Conflict Issue is Now Warranted

The present administration of the bankrupt estate is an outgrowth of the Creditors' Committee and those allied with it during the Chapter XI proceeding from February 18, 1975 to November 6, 1975. No issue regarding the composition of the Creditors' Committee, or the possibility of conflicting affiliations by its counsel, or the standby trustee, was raised with this Court during that period, so far as we are aware.* This may have been due to a combination of factors. Less was known about the conflicts, and no doubt there was an intense desire on the part of the debtor-in-possession to succeed in the reorganization: hence an impulse to placate the Creditors' Committee, its counsel and sponsoring creditors would not be unnatural.

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*Also, from what we have been told, we are convinced that the Trustee was unaware of the problem at the time of his designation.

Neither the other creditors nor the Court could have been aware of the magnitude of the problem at the time. And if the strategy of those organizing the Creditors' Committee was to stifle objection by the debtor-in-possession, they could not have done better than to load the Committee with airlines upon whom the debtor-in-possession was dependent in the Air Express relationship if a successful reorganization were to be achieved.

In any event, when the Chapter XI proceeding failed, those who had represented the Creditors' Committee came to be the guiding influence in the administration of the bankrupt estate, making the conflict problem much more crucial. Later, when the existence of a conflict situation involving the Trustee and the same railroad interests was revealed for the first time, the cumulative effect added to the gravity of the problem, in our view.

One need not impugn the good faith of the Trustee, and we do not, to conclude that railroad interests sponsored his selection as standby trustee, and that this would have an inhibiting effect on independent action by the Trustee in his selection or continued retention of bankruptcy counsel other than the same counsel sponsored by and positioned for that role by the same railroad interests; and of course the recommendations of bankruptcy counsel are of key importance in the administration of the bankrupt estate. When coupled with the added factor that the Trustee's firm of Shearson Hayden Stone, through another senior officer, itself does substantial consulting business

for railroad interests, and that the consulting work involves railroad financial interests not benefited by REA's major litigation against them, the circumstances create intangible and conflicting interest factors. A principal objective of the judicial conflict of interest rules is to avoid speculation about the relative influence of such factors.

Under Bankruptcy General Order 44, no attorney shall be appointed as bankruptcy counsel unless the Court is satisfied "that the attorney represents no interest adverse to the receiver, the trustee, or the estate in the matters upon which he is to be engaged . . . ."

It has been noted that one of the prime objectives of General Order 44 ". . . is to make sure that the proceedings will not be obstructed from within by the presence of some conflicting or adverse interest in the persons of those whose duty it is to enforce the rights of the creditors in their entirety. Where there is such adverse interest the court must refuse the requested authority to appoint." 3A Collier on Bankruptcy ¶ 62.12 [2].

The necessity for freedom from entangling associations is stressed in 2 Collier on Bankruptcy ¶ 44.23.

An attorney who represents a creditor whose claim is under attack should not be chosen as attorney for the trustee who, on behalf of other creditors, is charged with the responsibility of making the attack. In re Dixie Splint Coal Co., 31 F.Supp. 283 (D.C., Va. 1937), aff'd sub nom; Pepper v. Litton 308 U.S. 295 (1939). See also In re Woodruff, 121 F.2d 152 (9th Cir. 1941), cert. denied, 314 U.S. 652 cited for the proposition

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that an attorney for a general creditor is not qualified to act as attorney for a receiver where the creditor has an interest adverse to the estate. 2 Collier on Bankruptcy ¶ 44.24, n. 4.

It is true of course that Robert L. Wright, Esq., has been retained as special counsel in advising the Trustee as to REA's major litigation. This tends to insulate him to some extent from the conflict problem insofar as it involves the suits against the railroads, but it cannot absolve him from responsibility; he is still Trustee, and the creditors have not been informed of this major impediment regarding what may be the biggest asset of the bankrupt estate. Further, there are a myriad of other matters affecting the railroads unaffected by Mr. Wright's retention: the validity of their claims as creditors, the possibility of set-offs for substantial claims by REA, and breaches of contracts, railroad real estate leases with improvements thereon belonging to REA, and ultimate decisions on matters such as liquidation which would affect the railroads' interests in ways other than as creditors.

Whether the entire plan was the brain child of the railroads who played a key role in forming the Creditors' Committee, they certainly had a strong motive for wanting to be in a position to influence the administration of REA's bankruptcy for reasons having little to do with their interests as creditors.

The railroad industry has been an adept practitioner in the use of the so-called "indirect" techniques to pervert the decision-making process in government as shown by the findings in Noerr Motor Freight, Inc. v. Eastern Railroad Presidents Conference, 155 F.Supp. 768 (E.D.Pa. 1957). In Noerr on appeal, the

Supreme Cou. roundly condemned such tactics by the railroads but held that they did not constitute an antitrust cause of action. More recently, in California Motor Transport v. Trucking Unlimited, 404 U.S. 508 (1972), the Supreme Court went further and held that, when an attempt is made to abuse the adjudicatory process by making it an unwilling participant in antitrust restraints, such activities in themselves form the basis for an antitrust claim. The Court's opinion states (512, 515):

> ". . . unethical conduct in the setting of the adjudicatory process often results in sanctions."
>
> * * * * *
>
> "A combination of entrepreneurs to harass and deter their competitors from having 'free and unlimited access' to the agencies and courts, to defeat that right by massive, concerted, and purposeful activities of the group are ways of building up one empire and destroying another. As stated in the opinion concurring in the judgment, that is the essence of those parts of the complaint to which we refer. If these facts are proved, a violation of the antitrust laws has been established. If the end result is unlawful, it matters not that the means used in violation may be lawful."

Cf. Lektro-Vend Corp. v. Vendo Co., ___F.Supp.___, 1975-2 CCH Trade Cases ¶ 60,418 (N.D. Ill. 1975), appeal pending, a decision by Judge McLaren, who is very knowledgeable in the antitrust field.

The bankruptcy proceeding of course essentially involves the adjudicatory process. Thus the concern of the Supreme Court in shielding the adjudicatory process from indirect manipulation to

achieve results contrary to antitrust principles, as reflected in Trucking Unlimited, must be considered in any realistic assessment of the problem. When, as here, competitive factors are involved as well as the trend toward stricter standards for conflicts of interest generally -- so that the appearance of impropriety itself must be avoided -- indicated by the Second Circuit's decision in Cinema 5, Ltd. v. Cinerama, Inc., ___F.2d___ (2d Cir. Jan. 27, 1976, Dkt. No. 105), the importance of the issue seems clear.

Because of the gradual process by which information bearing on the conflict of interest issue became available, and the critical nature of the initial stage of the adjudication, the hesitancy of the Court to embark upon an investigation of the matter at an earlier date is understandable. The closing date for the filing of creditors' proofs of claims was not until June 8, 1976, and as yet there has been no post-adjudication meeting of the creditors as required by the Bankruptcy Act (§ 55). The Court's action in directing that the instant motion be served on this firm for its comments upon receipt from the Trustee or his counsel of our memoranda of May 6 and May 11, 1976, we interpret as an indication by the Court that it now desires to explore the issue.

V. Policy Aspects: Liquidation Versus Realization on Assets

We agree that exploration of the conflict issue is timely. The first post-adjudication meeting of creditors has yet to be held, and there has been no expression of views by them as to how the bankrupt estate is to be administered or its policy direction.

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Meanwhile, since adjudication it has become apparent that there are policy differences between those who want a precipitate liquidation of the express business and those who think that a greater realization upon its valuable operating rights will be produced for the creditors through the continuing operations of a 150-year old American transportation institution.

The application prepared by bankruptcy counsel in support of the instant motion itself reveals their liquidation attitude. The application concludes by referring to "the importance to the estate and to its creditors that the liquidation of this gigantic commercial enterprise proceed apace . . . ." (¶ 7) (Emphasis added.)

Others -- those who in our view are more experienced in transportation -- have advised that profitable and inclusive express operations should be restored on a step-by-step basis, and that by doing so the rights and authorities are more likely to be preserved and protected. It has been estimated that those authorities if made permanent would have values in the range of $50,000,000 to $100,000,000.

We do not deny that one function of bankruptcy is ultimate liquidation. However, the chief objective of bankruptcy is realization on assets. When the liquidation function places in jeopardy the realization objective, then policy considerations become important.

On the power of a trustee to operate a business 1 Collier on Bankruptcy 240-1 states:

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> "Clause (5) of § 2a permits the bankruptcy court to authorize the business of a bankrupt to be conducted for a limited period by a receiver or marshal, or by the trustee when appointed. This is a power that probably would belong inherently to the bankruptcy court as a court of equity, independent of the statute. The chief function of the Act is to distribute the bankrupt's assets pro rata and to marshal those assets to that end. In ordinary cases, the court of bankruptcy will go no further. Yet occasion will often arise where a going business may be preserved and advantageously sold by keeping it alive under the management of an officer of the court. By clause (5), courts of bankruptcy are vested with ample power to that end." (Footnotes omitted.)

With the existence of (1) differing views as to the desirability of the meat-ax approach to the liquidation of REA, and (2) certain interests -- both competitors and litigation defendants -- having motives for promoting the dismemberment of the express business for reasons unrelated to what is otherwise in the best interests of REA's creditors, the importance to the bankrupt estate of having a proper judicial determination of the conflict issue at this time seems clear.

VI. The Legal Basis for a Judicial Determination

For a thorough discussion of the evolution of the law on this subject, see In re Eloise Curtis, Inc., 261 F.Supp. 325 (S.D.N.Y. 1966). That case holds that this Court is the proper body to decide the qualification of the Trustee, and 2 Collier on Bankruptcy 1667 points out that under § 2a(17), as amended in 1938, a bankruptcy court may remove a trustee on its own motion. Honolulu Oil Corporation v. Kennedy, 251 F.2d 423 (2d Cir. 1957), holds that the qualification of bankruptcy counsel is also a matter for the court.

2 Collier 1069 states that the power of removal is less frequently exercised than the power of disapproval. Footnote 6, however, cites three New York District Court cases indicating that the power may be appropriately exercised on the basis of circumstances later coming to the court's attention. Moreover, because no meeting of the creditors has been held since adjudication, as pointed out above, it would appear that the initial appointment of the Trustee and bankruptcy counsel should be given less weight than would otherwise be the case. Indeed, the affidavits initially filed, by failing to reveal the existence of the conflicts, would appear to make the appointments voidable.

Actually, we do not think that removal is an issue. If disqualifying conflicts are found to exist, we have no reason for believing that the Trustee would not abide by such determination. In our view, this motion has been brought on by the Trustee because of a genuine and sincere desire on his part to have the issue resolved. Where we depart from the Trustee is on a matter of procedure; we think that under the Bankruptcy Act this Court has the sole responsibility for making the determination which he seeks. It seems self-evident that such responsibility should not and can not be delegated to a law firm selected by those regarding whom the conflict is asserted. Further, because the responsibility is this Court's, no purpose would be served by burdening the bankrupt estate with the cost of yet another opinion on the same subject.

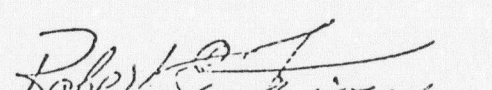
As we originally indicated, a more detailed examination of the facts on the conflict issue would be desirable, particularly with respect to the conflict of interest issue involving bankruptcy counsel. Because of the disputed nature of this issue, the importance of the interests involved, and in fairness to all concerned, the necessary factual determinations should be made on the record by this Court with notice to all creditors. See In re Eloise Curtis, Inc., 326 F.2d 698, 701 (2d Cir. 1964), which emphasizes that such a determination should be made "in the light of the particular facts of the case . . . ." If the Court desires to recuse itself on the basis of active participation in the administration of the bankrupt estate, or because of the press of other matters, we suggest that the issue be assigned to a United States Magistrate for findings pursuant to 28 U.S.C. § 636(b). Cf. S.D.N.Y. Bankruptcy Rule X-7 and General Rule 35(a).

CONCLUSION

The motion should be denied and the conflict issue determined by this Court or assigned to a United States Magistrate for findings and an initial decision.

Dated: New York, New York
June 14, 1976

Respectfully submitted,



Robert E. Friou
WISEHART, FRIOU & KOCH
Fourth Floor
150 East 42nd Street
New York, New York 10017

Certificate of Service

The foregoing Memorandum in Response to Notice of Motion was served by causing a true copy thereof to be delivered, by hand, prior to 10 a.m. this 15th day of June, 1976, upon those listed below.

Robert E. Friou

C. Orvis Sowerwine, Esq., Trustee
REA Express, Inc., Bankrupt
150 East 42nd Street
New York, New York 10017

Whitman & Ransom
522 Fifth Avenue
New York, New York 10036

Marcus & Angel
60 East 42nd Street
New York, New York 10022

Windels & Marx
51 West 51st Street
New York, New York 10019

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In the Matter of .	:	Bankruptcy Numbers
REA HOLDING CORPORATION	:	75-B-0251
THE EXPRESS COMPANY, INC.		75-B-0252
REA EXPRESS, INC., f/k/a Railway Express Agency, Inc.	:	75-B-0253
REXCO SUPPLY CORPORATION,	:	75-B-0254
Bankrupts.	:	AFFIDAVIT

- -x

AFFIDAVIT OF ROBERT E. FRIOU

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ROBERT E. FRIOU, being duly sworn, deposes and says:

1. I am a member of the bar of this court, a partner in the firm of Wischart, Friou & Koch, and counsel for REAEXCO, Inc., as well as certain creditors, in connection with the bankruptcy of REA Express, Inc. ("REA"). I make this affidavit with respect to the letter of Windels & Marx dated July 30, 1976, which is annexed hereto as Exhibit A.

2. Although the opinion letter of Windels & Marx is dated July 30, 1976, and deals with the subject on which this firm had previously given advice, namely the conflict of interest issue involving the Trustee of REA, C. Orvis Sowerwine, and his bankruptcy counsel, the firms of Whitman & Ransom, and Marcus & Angel, the Windels & Marx letter was not provided to me or any member of my firm until a hearing before Judge Galgay of the Bankruptcy Court on August 18, 1976, when it appeared that said letter had been submitted to the Bankruptcy Court on an ex parte basis.

3. The Windels & Marx letter was not submitted to me for review prior to its completion, notwithstanding the fact it dealt with the subject on which I had previously provided an opinion to the Trustee. I am informed that an attorney from Windels & Marx called my partner Arthur M. Wischart on or about July 30, 1976, the date of the letter, to ask Mr. Wischart to review the facts. Mr. Wischart stated that, since the prior opinions had been provided by me, and I was out of town, he would prefer to await my return the following Tuesday. The representative of Windels & Marx stated that he would find out from Mr. Windels what Mr. Windels desired to do and let Mr. Wischart know. However, Mr. Wischart did not hear further from Windels & Marx, and the letter was issued without any further action by that firm to ascertain the accuracy of the facts stated in the letter, or whether we possessed any additional facts that might be material or relevant to the conflict of interest issue.

4. The letter of Windels & Marx is factually inaccurate for reasons which will be discussed below. Further, this firm is in possession of additional information, some of which has been supplied to Judge Galgay on an in camera basis, which the Bankruptcy Court, for reasons which we do not understand, has not pursued. This firm has been of the view continuously that the conflict of interest issue should be made the subject of a judicial determination, and should not be relegated, as the Trustee and his counsel seek to do, to a matter to be determined by another law firm, of their own choosing, without a full hearing on the record, and on the basis of ex parte assertions and self-serving declarations.

5. The Windels & Marx letter notes that the Trustee was selected by Stuart D. Baker, Esq., a partn of Chadbourne, Parke, Whiteside & Wolff, counsel to several airlines which are creditors of REA. However, the letter fails to note (a) that REA has claims against the same airlines totaling approximately $50 million, far more than the amount of their claims against REA, which remain pending, and (b) that the airlines are also in the position of having been competitors of REA, and in an adverse relationship to REA in connection with REA's Air Express services, which at least some of the airlines sought to replace with competing services of their own, and have succeeded in doing, making advantageous to them, as well as the railroads, the demise and liquidation of REA.

6. As noted more fully in the other papers submitted in this matter, one of the chief issues with respect to the conflict of interest problem has to do with the desire of the railroads for the liquidation of REA, a desire dating back to 1959, which has been implemented by the Trustee, and brought about by the Creditors' Committee comprised principally of airline and railroad representatives, including the bankruptcy counsel, who are or have been representatives of the railroad creditors, and who formally nominated the Trustee as standby Trustee while REA was in Chapter XI.

7. It is misleading for the letter of Windels & Marx to state that this firm appeared at the time of the selection of the Trustee by the creditors. Mr. Wiechart was present only as an observer; the firm of Anderson Russell Kill & Olick represented REA as debtor-in-possession during the Chapter XI proceeding, not this firm. Further, at that time, we had no information concerning the manner in which the Trustee was selected, or the involvement of Shearson Hayden Stone with the railroads.

However, shortly after that time, and during the Chapter XI proceeding, this firm did bring to the attention of Anderson Russell Kill & Olick the fact that Whitman & Ransom represented railroad interests, and that a serious conflict of interest problem existed with respect to the importance of effectively pursuing the railroad litigation. The same concern was expressed to a member of Chadbourne, Parke, Whiteside & Wolff at the time.

8. Further, at the meeting of April 8, 1975, of course, REA was a debtor-in-possession under Chapter XI, not a bankrupt. The company was still in operation under its former management, and there was no trustee. Mr. Sowerwine was named only as "standby Trustee", and his qualifications to act as Trustee, if REA were adjudicated a bankrupt, as it was some seven months later, were not in issue. Further, at that time, only limited information was known concerning the extent of railroad interests involved in the firms then acting as counsel to the Creditors' Committee, and, of course, it was not known that in the event of adjudication, Mr. Sowerwine would select these same firms which nominated him as "standby Trustee" to be bankruptcy counsel. For example, it was not realized at the time that a senior partner in Whitman & Ransom was also a Trustee of the New Haven Railroad, a part of the Penn Central, which has a major interest in some of REA's litigation against the railroads. Also, the Penn Central was represented on REA's Creditors' Committee, and, as such, on information and belief, played a leading role in urging the liquidation of REA, the objective of the railroads since 1959, as stated elsewhere.

9. Although the extent of the railroad involvement of the firms representing the Trustee as bankruptcy counsel became apparent only gradually, and the facts are still not all

a matter of public record, this firm promptly advised both the Trustee and Judge Galgay of the problem. We had every reason to believe that, based upon our advice, the Trustee would take prompt and prudent action to have the matter judicially determined. We were in fact mystified by the Trustee's apparent willingness to leave the matter unresolved, particularly when we informed him that we had consulted with Professor S. Chesterfield Oppenheim, who is of counsel to this firm in connection with the major antitrust litigation against the railroads, and that he was of the view that the conflict of interest problem should result in both notice to the creditors and disqualification. Only later did we learn what seemed to be the most logical explanation for the Trustee's non-action: namely, that he himself was burdened with the same problem because of his relationship with Shearson Hayden Stone as a senior officer.

10. The Windels & Marx letter refers to the Trustee as being an officer of Shearson Hayden Stone "on leave of absence pending the termination of your duties as Trustee ...." The fact that the Trustee is on leave of absence is new information, and certainly not the situation either at the time of his selection as standby Trustee or at the time of his designation as Trustee upon the adjudication of REA. We believe that the Trustee continued to be active in Shearson Hayden Stone for a substantial part of the period while he functioned as the Trustee of REA, and during the most important time when the decision to liquidate REA was made rather than to change its status into a Chapter X reorganization proceeding.

11. If the Trustee's recent action to go on leave of absence from Shearson Hayden Stone is regarded as changing the situation, a factual inquiry should be made into (a) when the action was taken, (b) why it was taken, (c) who participated,

(d) whether it was on advice received from counsel and, if so, who, and (e) the financial arrangements and other terms (a telephone call to Shearson Hayden Stone on August 20, 1976 elicited the information that Mr. Sowerwine continues to maintain an office and secretary there, who expects him to be back in the office on September 7, 1976).

12. Having been advised by S. Chesterfield Oppenheim that in his view there is no exculpation for the Trustee with respect to the conflict problem even if the Trustee should resign from Shearson Hayden Stone, we believe that the Trustee's recent decision merely to take a leave of absence from Shearson Hayden Stone does not substantially alter the basic conflict problem; it certainly does nothing insofar as that problem affects (a) conflict-tainted activities which have already occurred, and (b) bankruptcy counsel having the same conflict problem upon whom the Trustee relies for most practical purposes in the continuing administration of the bankrupt estate. As stated in 2 Collier on Bankruptcy ¶ 44.22, p. 1681, fn. 5, "... an attorney for a creditor whose claim is under attack should not be chosen as attorney for the trustee whose duty it is to make the attack." See also Pepper v. Litton, 308 U.S. 295, fn. 4 (1939); Matter of Woodruff, 121 F.2d 152 (9th Cir.), cert. denied, 314 U.S. 652 (1941).

13. The Windels & Marx letter refers to a so-called hearing before the Bankruptcy Court on March 9, 1976, in which the Trustee allegedly made his connection with Shearson Hayden Stone and its activities in the railroad field a matter of public record. In the first place, most of the meeting was conducted in the chambers of Honorable John J. Galgay of the Bankruptcy Court and not made a matter of public record, despite

the fact that this firm specifically requested that all statements made that day be put on the public record. Second, the extent of the involvement of Shearson Hayden Stone in railroad matters was not disclosed. Third, the creditors, the parties most interested in the subject of conflict of interest, were not notified in any manner of the existence of this problem by the Trustee or his counsel. And fourth, during the meeting in chambers certain statements were made by counsel for the Trustee which later proved to be incorrect. For example, the representative of the firm of Marcus & Angel stated flatly that his firm did not represent the Penn Central Railroad. Only recently, have we discovered, that his firm did represent the Penn Central Railroad, as a creditor in another bankruptcy proceeding, at approximately the same time when the Creditors' Committee of REA was being formed, and when the Penn Central was elected as a member of the Creditors' Committee, thereafter becoming, on information and belief, a member of the Executive Committee, and aggressively seeking the adjudication and liquidation of REA during the Chapter XI period.

14. The Windels & Marx letter incorrectly states that the Trustee has not participated in REA's major litigation against the railroads. In fact, we are prepared to show that the Trustee in fact has actively participated in discussions with respect to various strategies and decisions concerning the railroad litigation. The Windels & Marx letter assumes that any comments by the Trustee on the litigation against the railroads would be formal in writing, and available to the court and all parties; however, and actual fact, apparently Windels & Marx has not been advised of the Trustee's active participation with respect to the litigation in a very informal manner and certainly not by giving notice to all parties involved.

15. The Windels & Marx letter seeks to excise the problem of the litigation against the railroads by the special retention of Mr. Wright to handle these matters. It is noteworthy in passing that neither the Trustee nor his bankruptcy counsel can claim credit for the situation leading to the selection of Mr. Wright; Judge Galgay took that action only because this firm continually raised the conflict issue, but the conflict issue itself was left unresolved. However, the selection of Mr. Wright does not solve the problem of railroad and airline involvement in other aspects of the administration of the bankrupt estate, nor does the letter of Windels & Marx refer to the problem. For example, how are the claims against REA of the railroads and airlines to be handled in the bankruptcy proceeding? Those claims are many and substantial; in the view of this firm, those claims in large part should be treated as a nullity and disregarded because they are intimately related to the claims that REA has against the railroads in major litigation. However, bankruptcy counsel and the Trustee have made no effort to have the railroad and airline claims against REA in the pending bankruptcy proceeding declared null and void, although they have attempted to have substantial claims of REA's former employees who have been thrown out of work as a result of the railroad/airline liquidation policy so declared. As a practical matter, the bankrupt estate cannot be effectively administered until a determination is made as to the validity of the railroad and airline claims, and it is our belief that, because of the dilemma caused by the doubtful nature of these claims, the essential step of having a first meeting of creditors following adjudication has been postponed by the Trustee and bankruptcy counsel for more than nine months.

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16. The firm of Windels & Marx relies upon the importance of the qualifications which a Trustee must have to execute his responsibilities, and says that this is just as important as freedom from conflicts of interest. If this is meant to imply that it is impossible to find a Trustee in New York City, who is both qualified and does not have conflicts of interest, we think that the implication is without any foundation whatsoever; certainly persons of high standing and practical experience, yet without conflicts of interest, can be found to act as judges. In our view, a Trustee acts as an officer of the court, and particularly in view of the fact that many of his activities are done on an informal basis, and relied upon extensively by the Bankruptcy Court itself, the lack of conflict of interest is of crucial importance to the proper administration of justice. It may be that the Trustee, as suggested by Windels & Marx, is qualified to liquidate REA; however, we respectfully submit, based upon the testimony of Mr. F. Ralph Nogg, who was a successful Chapter X Trustee for Yale Express, Inc., that the Trustee here is not qualified to be an operating Trustee. The essential determination, namely whether to liquidate REA or to seek its reorganization, is the crux of the matter with respect to which the conflict of interest here involved is fatal, and taints all subsequent decisions, including the recommendation of the Alltrans proposal, the subject of this appeal, which presupposes that the decision to liquidate was valid.

17. The letter of Windels & Marx refers to the stage which the bankrupt estate is in, in connection with its administration, and whether or not the withdrawal of the Trustee would create substantial practical difficulties. If that is an issue, we think there certainly should be a hearing on it; we respectfully submit that that is a matter concerning which others

may have views which differ from and are based upon more information than that possessed by Windels & Marx, which has not participated to any extent in the bankruptcy proceedings involving REA. In this proceeding, we have submitted a Chapter X petition to Judge Galgay which in our view would obviate the practical problems, and the Bankruptcy Court's failure to act on that petition is one of the principal issues of this appeal.

18. The Windels & Marx letter attaches no apparent significance to the statements by the Trustee to third parties that he felt that he did have a conflict of interest. The teaching of the Second Circuit's recent decision in Cinema 5 v. Cinerama, Inc., ___F.2d___, copy annexed hereto as Exhibit B, a decision which was promptly brought to the attention of the Trustee and his bankruptcy counsel after it was decided on January 27, 1976, but ignored in the Windels & Marx letter, is that the test is "not only the fact, but even the appearance, of representing conflicting interests" (p. 1644). The great bulk of the claims of creditors in connection with this bankruptcy is in the hands of former employees. These employees cannot be expected to have confidence in the manner in which the bankrupt estate is being administered, especially on the crucial decision of whether to liquidate the company or place it into reorganization, when the Trustee himself, to their representatives, has stated that he himself felt that he had a conflict of interest. The confidence of people in the administration of justice, particularly in the bankruptcy arena, which so largely functions upon the basis, as the other documents in this record show, of ex parte applications and orders, requires a far higher standard than exhibited to date in this proceeding. The scandals concerning the selection of receivers, or trustees, in the railroad

manipulations in the first half of the last century, which gave rise to the formation of the Association of the Bar of the City of New York, should be ample warning. See Martin, Causes and Conflicts, The Centennial History of the Association of the Bar of the City of New York, 1870-1970. The point is clear, we think, that great care should be exercised by the Bankruptcy Courts in the selection of trustees, particularly in large bankruptcies with large interests at stake. This was not done in this case. The adjudication of REA took place on November 6, 1975 and the Trustee was selected one day later, without any notice generally to the creditors for a hearing on the subject, and to date, there still has not been a meeting of creditors to consider the basic policies that the Trustee is pursuing or even his qualifications to continue as Trustee. Bankruptcy proceedings are for the benefit of the creditors generally, and not for the self-serving purposes of a few which, like the large railroad and airline creditors here involved, have dominated the administration of this bankrupt estate, despite the fact that REA has claims against them greatly exceeding the amount of their claims against REA, while, as to the claims of the employees thrown out of work by their manipulations to bring about REA's liquidation, the Trustee seeks to ignore and grind into dust these claims by having them declared worthless.

19. The underlying assumption of the Windels & Marx letter that the Trustee has not participated with respect to REA's major litigation is contrary to the facts as mentioned above. The chief participation of the Trustee and his bankruptcy counsel from the very beginning has been in the form of harassment to this firm utilizing techniques designed to make it

impossible for the cases to be carried on. The Trustee and his counsel have engaged in a continuing course of conduct designed to prevent this firm from pursuing REA's major litigation, potentially its largest asset, and have maliciously interfered with the members of the firm in an effort to cause its dissolution. The latest episode was the Trustee's purported action, wholly ultra vires and without authority of the Bankruptcy Court, to terminate this firm's activities with respect to such litigation and other matters. The Trustee purported to give other reasons for his action, set forth in the letter annexed hereto as Exhibit C. The reasons given in the Trustee's letter are specious in our view, as shown in our answering memorandum annexed hereto as Exhibit D. We submit that the Trustee's purported action was another attempt to interfere with REA's major litigation against the railroads and make it impossible for it to be pursued effectively, and that it also reflected an element of vindictiveness because of this firm's position on the conflict of interest question which he had put to it. Mr. Wright, the adviser selected by Judge Galgay with respect to such litigation, immediately voiced his strong disapproval of such action by the Trustee, stating that it was imprudent, and that this firm's participation is essential to the continuation of the litigation against the railroads. The Trustee thereupon of necessity modified his purported action insofar as the litigation is concerned.

20. The major litigation is part of the REAEMCO proposal which is the subject of this appeal. Under the REAEMCO proposal, the litigation would be conducted by REAEMCO, which would use the proceeds in part to restore and rehabilitate the express service, turning over to the Trustee for the creditors 25% of the net proceeds. Orally, Mr. Wright had already expressed the view to the Trustee, in the presence of Mr. Wisehart, that such an approach would, in his opinion, put the litigation in a favorable

posture, showing (a) that there is a reasonable prospect of pursuing the cases, and (b) that the proceeds would not enrich the former stockholders of REA, but would go to the creditors and to the restoration and rehabilitation of the express company. However, after the idea became formally expressed in the REAEMCO proposal, Mr. Sowerwine failed to request Mr. Wright's opinion upon the desirability of that aspect of the proposal in a formal opinion although Mr. Wiechart asked that he do so. Instead, Mr. Sowerwine continuously attempted to have that aspect severed from the rest of the REAEMCO proposal. The culmination of this tactic took place at midpoint in the hearing below when bankruptcy counsel, without prior notice, announced, on behalf of the Trustee, as among the "general conditions" to which the various offers for REA or its rights must conform, that the disposition of REA's major litigation must be eliminated as part of the proposal (Tr. July 8, 1976, pp. 9-11). Prompt objection was voiced (Tr. July 9, 1976, pp. 207-208), and we submit that such arbitrary action by those having a conflict of interest is both a denial of due process, making the hearing itself a nullity, and, in the absence of any alternative plan for pursuing the litigation, inconsistent with the holding of Matter of Ira Haupt & Co., 398 F.2d 294 (2d Cir. 1968). The Bankruptcy Court failed to make any findings as to the desirability of that aspect of the REAEMCO proposal, and the other parties took no position regarding it. We do not with to belabor this point; however, in our view, concurred in by Professor S. Chesterfield Oppenheim, a leading antitrust authority, REA's major litigation is potentially its most valuable asset. Among other things, it certainly can provide a basis for recovering funds necessary to put REA's thousands of employees back to work in a revitalized company. The failure to come to grips with the question of how to pursue the cases effectively, rather than merely

capitulating for lack of wherewithal to the railroads which drained REA dry over the years, throwing out of work the employees for whose employment benefits they were originally liable, if REA should fail, is a serious matter, deserving better than the cavalier treatment it has received to date.

21. On or about April 29, the Trustee inquired of me as to my progress in preparing the requested opinion on conflict of interest. I told him that I had done substantial work on that matter but had not as yet finished an opinion. He then said to me that he would soon have to make a decision as to which proposal to recommend to the Court and that he would appreciate my expediting the opinion. He said that he would need to have the opinion before he could issue his recommendation as between the Alltrans and REAEMCO proposals, and he further told me that at that time he had not yet made his decision. From this I have concluded that he concurred in the view that the opinion on conflict of interest on which I was working was relevant to his decision on the disposition of the operating rights, and thus relevant to the substance of this appeal. In accordance with his request, we exerted every effort to complete the opinion promptly and did so on May 6, 1976 with a supplement on May 11, 1976. The Trustee's decision was made known to my law firm on May 20, 1976, and was made public on May 21, 1976.

22. Of course Mr. Sowerwine has made the conflict issue a part of this appeal in another sense: on the issue of credibility. Through a memorandum filed by his counsel, the statements made in our opinion that he had said to third parties that he had concluded that he had a conflict problem are termed a "wicked lie" (p. 1). The memorandum then states that "the Wischart firm willfully, deliberately and clearly maliciously continues to repeat this falsehood" (p. 2). Mr. Sowerwine has known Mr. Wischart and me for over twenty years. I would not willingly believe that he would permit statements accusing us of being wicked and malicious liars to be made about us with his knowledge or consent. I therefore was even more shocked when the memorandum purported to speak for Mr. Sowerwine (p. 2): "So that there can be no doubt now or in the future, the Trustee absolutely denies that he ever believed he had a conflict of interest in acting as Trustee of this bankrupt, denies that he presently believes that any such conflict exists and denies that he ever stated that he either had or believed he had any such conflict." Because these statements were so shocking to me, I specifically brought to Mr. Sowerwine's attention the fact that we were being called wicked liars by his counsel, but nothing was done. We moved to strike the memorandum, we brought in the two witnesses who heard Mr. Sowerwine make such statements as part of the REAEMCO hearing; still nothing was done by Mr. Sowerwine. Only after the argument on making the memorandum a part of the record on this appeal had been concluded did bankruptcy counsel offer to withdraw the scurrilous and defamatory memorandum, but that was no thanks to Mr. Sowerwine, who was far away in Australia. The fact is that Mr. Sowerwine did make the statements that he believed he had a conflict of interest to third parties, accord-

ing to their sworn statements. For his counsel to brand the reference to such statements as malicious, wicked lies in a paper filed with the court, and for Mr. Sowerwine to leave such statements stand when they are specifically brought to his attention, raises an issue of credibility which should entirely vitiate the reliance which the Bankruptcy Court placed on Mr. Sowerwine's statements and recommendations in this proceeding. Bankruptcy Rule 810 specifies that on appeal, a District Court "shall give due regard to the opportunity of the referee to judge the credibility of the witnesses." But the correlative of opportunity is responsibility, because the Bankruptcy Judge failed to exercise this responsibility by admitting evidence directly bearing on the credibility of the Trustee on whose statement he chiefly relied in making his decision, the decision itself can not stand.

CONCLUSION

1. The appeal from the Trustee's motion to strike Item 3 and part of Item 4 from REAEMCO, Inc.'s designation of the appeal record relates squarely to the conflict question and therefore motion of REAEMCO, Inc. to consolidate the appeals should be granted.

2. For all of the foregoing reasons, and the other papers submitted in connection with the conflict of interest issue, this Court either should declare that the Trustee and his counsel are disqualified because of conflict of interests, and remand the matter to the Bankruptcy Court for further

proceedings, or should order a hearing on the facts involved in the conflict issue with a report to be rendered by either the Bankruptcy Court or a United States Magistrate to be designated for that purpose.

Respectfully submitted,

Robert E. Friou

Sworn to before me this
23rd day of August 1976

Notary Public
ANTHONY T. FARA
NOTARY PUBLIC, State of New York
No. 31-4525442
Qualified in New York County
Commission Expires March 30, 1978

FINDELS & MARX
51 WEST 51ST STREET
NEW YORK, N.Y. 10019

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[212] 600
CABLE: WISNARLAW
TELEX: 12-6050 (DOMESTIC)
66103 (INTERNATIONAL)

July 30, 1976

C. Orvis Sowerwine, Esq.
Trustee in Bankruptcy
REA Express, Inc., Bankrupt
150 East 42nd Street
New York, New York 10017

BEST COPY AVAILABLE

In Re REA Express, Inc., Bankrupt
U.S. District Court, S.D.N.Y., 75 B 253 (JJC)

Dear Mr. Sowerwine:

You have requested our opinion as special counsel in respect of possible conflicts of interest arising out of your responsibilities as Trustee in Bankruptcy of REA Express Co., Inc. and related companies ("REA") in the captioned proceeding. Your request is pursuant to an order (a copy of which is attached), dated June 18, 1976, of the Honorable John J. Galgay, Bankruptcy Judge, before whom this matter has been pending.

We understand that: On April 7, 1975, Stuart D. Baker, Esq., a partner of Chadbourne, Parke, Whiteside & Wolff, counsel to several airlines which are creditors of REA, asked you, completely on his own initiative, if you would serve as Standby Trustee for REA which was then operating as debtor in possession under Chapter XI of the Bankruptcy Act; and you indicated a willingness to do so. You had formerly been a partner of Mr. Baker's but had withdrawn from the Chadbourne firm to join Hayden, Stone & Co., which is now Shearson Hayden Stone, Inc., investment bankers and members of the New York Stock Exchange. Shearson Hayden Stone is a large, publicly-held firm conducting its business throughout the United States and in the major financial centers of the world. You are an officer of that firm on leave of absence pending the termination of your duties as Trustee and the owner of somewhat less than 1/10th of 1% of its outstanding equity. At Chadbourne and thereafter at Shearson Hayden Stone, your recognized specialty has been the analysis of the financial problems and requirements of corporations. You did not solicit or cause the solicitation of any creditor or other interested party in connection with your designation as Trustee of REA, and you were not aware of any direct or indirect relationships with or interests on your part involving REA or any of its creditors or debtors which might have been the basis of your disqualification.

EXHIBIT A

We have reviewed the record of the meeting of the creditors of REA in the presence of the Court on April 8, 1975, at which you were unanimously selected by the creditors and then designated by the Court to serve as Standby Trustee. It appears that appropriate notice of the meeting was given and that the qualification of claims, voting, and other proceedings were proper in all respects. It further appears from the record that you duly became Trustee on November 7, 1975, in connection with the adjudication of REA as a bankrupt. No question was raised as to your thorough qualification, including the absence of any conflicting interests.

Our review of the proceedings to date indicates that the affairs of REA involve highly complex legal and managerial problems and that, notwithstanding, this proceeding has progressed steadily with the sale of the major assets, the reduction of costs of administration, the handling of claims, and the completion of an arrangement which may result in a nationwide express service.

The particular aspect of the REA bankruptcy which bears upon the problem presented to us is the following: In about 1971, upon the recommendation of Arthur M. Wisehart, Esq., REA's then counsel as well as an officer, director, and substantial stockholder of REA, two suits in the United States District Court, pursuant to the provisions of the Sherman and Clayton Acts, and an administrative proceeding before the Interstate Commerce Commission, pursuant to the Interstate Commerce Act, were started by it against various railroads, including some railroads which carried mounting receivables due from REA (the "creditor-defendant railroads"). Substantial claims were asserted, and these actions were initially pursued on behalf of REA by Mr. Wisehart and then by the predecessor of the firm of Wisehart, Friou & Koch. Accordingly, at the time REA was adjudicated a bankrupt in 1975 and you became its Trustee, the creditor-defendant railroads were not only among the significant creditors of the bankrupt estate, but the claims in pending litigation against them represented a contingent asset of the estate. The litigations were being pursued on behalf of REA at the time of its adjudication as Bankrupt by the Wisehart firm and local counsel retained by it; however, in view of that firm's connection with the prior ownership and management of REA, it clearly faced a conflict of interest which would bar it from acting in any way on behalf of REA in bankruptcy. Judge Calgay suggested Robert L. Wright, Esq., an experienced attorney in antitrust matters and not connected with the creditors or their counsel, as special counsel to represent the Bankrupt in these litigations against the creditor-defendant railroads, and he was so designated by you. To date, the claims asserted in one of the

two law suits and certain of the claims asserted in the I.C.C. proceeding have been dismissed, but appeals are pending. You have not participated at all in these litigations; however, you continued until just recently to retain the Wisehart firm, with the consent of the Court and your regular counsel, to assist Mr. Wright because of its familiarity with these matters. We are not aware of any criticism at all of the manner in which Mr. Wright, with the assistance of the Wisehart firm, has represented the interests of the Bankrupt. It is to be noted that the Wisehart firm has actively participated in these bankruptcy proceedings as counsel to REAEMCO which was to exchange its stock for claims of employee-creditors and which was proponent of one of the plans for the disposition of the business of REA.

Meanwhile, you caused a special inquiry within Shearson Hayden Stone to determine whether it conducted any business with any railroad, and this elicited the fact that, through one of its divisions, it has been rendering financial services to various railroads including some of the creditor-defendant railroads. At the next hearing before the Court, on March 9, 1976, you made this a matter of public record.

It appears that no one at the time, including the Court and counsel, regarded this as a serious matter of conflict; however, your counsel stated that if you wished you might obtain an opinion of outside counsel. Thereafter, on April 13, 1976, you discussed the matter among other things with Robert E. Friou, Esq., of the Wisehart firm; and then on May 6 and May 11, 1976, the Wisehart firm expressed successive opinions to the effect that your interest in Shearson Hayden Stone created serious conflicts with your obligations as Trustee. In the view of the Wisehart firm, these conflicts arose not only out of your Shearson Hayden Stone connection but also by virtue of your initial designation as Trustee in part by the creditor-defendant railroads. Copies of the several opinions of the Wisehart firm and your responsive application to the Court which resulted in our appointment are attached to this opinion.

Legal Discussion

In view of the standing of the Wisehart firm and its particular familiarity with the affairs of REA and also in view of the importance and sensitivity of this proceeding, it is well to give the question of conflict which it has raised specific and careful attention. We agree with the attached memoranda of that firm that there can be no compromise with any reasonable indication that the execution of trust responsibilities is or may be effected by reason of conflicts with significant outside interests.

The Bankruptcy Act provides (at Section 72) that the creditors of a bankrupt shall appoint a trustee, and it specifically excludes the participation of creditors who are stockholders, officers or directors of the bankrupt. This expresses the clear policy of full control by creditors without participation by the bankrupt. The loyalty of a trustee in bankruptcy must be to the creditors as a class (see 11 Collier on Bankruptcy §7.001(3)(14th ed. 1973)).

The whole question of possible conflict here is derived from the duality of the interests of the creditor-defendant railroads. Under certain circumstances the courts have disapproved of the selection of a trustee, if the selection has been brought about by creditors having such conflicting interests. Instances in which the selection of a trustee by the creditors was disapproved are: In Re Anson Mercantile Co., 185 F. 993 (N.D. Tex. 1911), (employee-shareholder of a large creditor holding security for part of its debt, and charged with having received preferences); Wilson v. Continental Bldg. & L. Asso., 232 F. 824 (C.A. 9th Cir. 1916), aff'g 232 F. 413, (a trust company which held in trust a large number of deeds securing obligations owing to the bankrupt); Beale v. Snead, 81 F. 2d 970 (C.A. 4th Cir. 1936), cert den 298 U.S. 685, (elected by a creditor holding disputed mortgage); and In Re Lurie Bros., Inc., 267 F. 2d 33 (C.A. 7th Cir. 1959), (recommended by creditor who had received possible preference). On the other hand, the following are typical of cases in which the Court approved the selection of the trustee, notwithstanding allegations by creditors of conflict: In Re Foley, 1 F. 2d 568 (D.C. Cal. 1924), (former employee of a bank which held a large stock interest in one of the bankrupt's creditors which had received possible preference); In Re Paramount Publix Corp., 68 F. 2d 703 (C.A. 2d Cir. 1934), cert den 292 U.S. 652, (stockholder and former director of creditor alleged to have received possible preference and former officers of bankrupt's competitors); and In Re Eloise Curtis, Inc., 261 F. Supp. 325 (S.D.N.Y. 1966), aff'd. 388 F. 2d 416 (C.A. 2d Cir. 1967), (credit adjustment bureau).

These authorities reiterate that questions of conflict must be resolved by a practical evaluation of the facts, the question invariably is whether or not there are reasonable grounds to believe that the trustee's interests will not be exclusively those of the creditors as a class.

The facts we consider of significance in respect of your original selection at the first meeting of creditors are: the creditor-defendant railroads represented a minority interest

at that meeting, your selection by the creditors was unanimous; there was no objection to your selection even though the Wiechart firm appeared at the meeting, and was very much aware of the REA claims against the railroads; and you were not the candidate of the creditor-defendant railroads but rather the suggestion of an entirely different group of creditors, to which suggestion the creditor-defendant railroads acceded in view of your particular qualifications for the responsibilities.

After you became Trustee, it appears to us that the Court effectively excised the problem of the litigations against the creditor-defendant railroads by suggesting the retention of Mr. Wright to handle these matters. For instances in which this approach has been sanctioned see In Re National Public Service Corp., 68 F. 2d 859, 863 (2d Cir. 1934); In Re Eloise Curtis, Inc., 326 F. 2d 698 (2d Cir. 1964); and In Re G.E.C. Securities, Inc., 331 F. 2d 655, 656 (2d Cir. 1964). There has been no inference of any impediment to the efforts of Mr. Wright on behalf of the estate; and while you are, and certainly should be, in a position to comment on developments, it is assumed that such comment would be in a formal writing and available to the Court and all parties or also given in the actual presence of the Court.

We take up now the matter of the subsequently disclosed relationship between the creditor-defendant railroads and Shearson Hayden Stone. We believe that pertinent details tend to minimize drastically the impact of this relationship on you and your trust responsibilities. This particular activity of Shearson Hayden Stone is part of its regular business, and has been carried on away from you. You had no involvement in it, or even knowledge of it until you affirmatively sought out the possibility. Furthermore, you are on leave of absence from your firm, and also the percentage of your stock ownership is so small that the profitability of any such work would have a de minimus effect on your own interests.

Further on this point of the involvement of Shearson Hayden Stone: It is just as important that any trustee have professional qualifications to execute his responsibilities as that he be free from conflicts, both of these aspects of full qualification are essential. See In Re Paramount Public Corporation, supra, at 706; In Re Foley, supra, at 569. The far reaching ramifications of the affairs of REA, of its diverse and numerous creditors, and of others in the transportation industry having an interest in its business and affairs, raises a myriad of theoretical conflicts down the line. In a proceeding such as

this, it would not be likely to get the necessary expertise and at the same time meet a laboratory test for no conceivable theoretical conflict. That, of course, is why issues of this sort are resolved by a weighing of practical considerations rather than on the basis of an absolute and technical rule.

It is finally noted that your withdrawal as Trustee at this stage would undoubtedly generate substantial difficulties and loss for the estate; and for this reason the courts have been particularly loathe to interrupt a trusteeship well along in the course of a bankruptcy proceeding. See In the Matter of Flexible Conveyor Co., 156 F. Supp. 164 (N.D. Ohio 1957), (in which the court refused to disapprove the appointment of the trustee made ten months prior because it would serve no useful purpose, notwithstanding an improper election); 2A Collier on Bankruptcy ¶44.19 (14th ed. 1974); 70 Dick. L.Rev. 227, 232 (1960); 43 Yale L.J. 1187, 1190 (1934). Only in the most compelling situations will the Court remove a serving Trustee, for example, In Re Oliveri, 45 F. Supp. 32 (E.D. N.Y. 1942), in which the trustee had failed to disclose that he was attorney for and officer of a corporation which was the landlord of premises occupied by the bankrupt and which had an interest adverse to those of the general creditors.

Conclusions

Accordingly, we conclude that your obligations to the estate are such that you should not resign as Trustee based upon the information and reasons which have been presented in the attached memoranda and reviewed in this letter. We further do not think it appropriate for you to sever completely your relationship with Shearson Hayden Stone.

We trust this answers the questions that you have presented to us for our opinion.

Very truly yours,

WIENDELS & MARX

By Paul Wiendels, Jr.

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1976-1 Trade Cases ¶60,847

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 105—September Term, 1975.

(Argued October 23, 1975 Decided January 27, 1976.)

Docket No. 75-7185

CINEMA 5, LTD.,

Plaintiff-Appellant,

v.

CINERAMA, INC., NATIONWIDE THEATRES CORP., CONSOLIDATED AMUSEMENT CO., LTD., PACIFIC THEATRES CORPORATION, ATLANTIC THEATRES CORP. OF CALIFORNIA, RKO-STANLEY WARNER THEATRES, INC., WILLIAM R. FORMAN, MICHAEL R. FORMAN and JAMES J. COTTER,

Defendants-Appellees.

Before:

MOORE, FEINBERG and VAN GRAAFEILAND,
Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Charles L. Brieant, Jr., *Judge*, disqualifying plaintiff's counsel from further representation of the plaintiff in this action.

Affirmed.

DONALD J. COHN, New York, N. Y. (Webster, Sheffield, Fleischmann, Hitchcock & Brook-

Exhibit B

field, New York, N. Y., James V. Kearney, on the brief), *for Plaintiff-Appellant.*

James P. Kane, New York, N. Y. (Phillips, Nizer, Benjamin, Krim & Ballon, New York, N. Y., Simon Rose, David G. Rosenthal, on the brief), *for Defendants-Appellees.*

Van Graafeiland, *Circuit Judge:*

This appeal from an order granting defendants' motion to disqualify plaintiff's counsel presents a somewhat unusual set of facts. Counsel has been disqualified from further representation of plaintiff because a partner in this New York City law firm is also a partner in a Buffalo firm which is presently representing the defendant Cinerama, Inc. in other litigation of a somewhat similar nature. Although we agree with the district court that there was no actual wrongdoing and intend no criticism of the lawyers involved, we find no abuse of the district court's discretion. *Hull* v. *Celanese Corp.*, 513 F.2d 568, 571 (2d Cir. 1975), and so affirm.

There is little or no dispute as to the facts, most of them having been stipulated. Attorney Manly Fleischmann is a partner in Jaeckle, Fleischmann and Mugel of Buffalo and in Webster, Sheffield, Fleischmann, Hitchcock and Brookfield of New York City. He divides his time between the two offices. Cinerama is a distributor of motion pictures and the operator of several large theater chains. In January 1972 the Jaeckle firm was retained to represent Cinerama and several other defendants in an action brought in the United States District Court for the Western District of New York. Plaintiffs in that suit are local upstate theater operators who allege anti-trust violations resulting from discriminatory

and monopolize the licensing and distribution of motion pictures in the Rochester area. A similar action involving allegedly illegal distribution in the Buffalo area was commenced in March 1974, and the Jaeckle office represents the interests of Cinerama in this action also. Both suits are presently pending in the Western District.

The instant action, brought in the Southern District of New York in August 1974, alleges a conspiracy among the defendants to acquire control of plaintiff corporation through stock acquisitions, with the intention of creating a monopoly and restraining competition in New York City's first-run motion picture theater market. Judge Brieant found that there was sufficient relationship between the two law firms and the two controversies to inhibit future confidential communications between Cinerama and its attorneys and that disqualification was required to avoid even the appearance of professional impropriety, citing as authority our decision in *General Motors Corp. v. City of New York*, 501 F.2d 639 (2d Cir. 1974).

Appellant's counsel strongly dispute these findings. They say that they should not be disqualified unless the relationship between the controversies is substantial, and they contend there is nothing substantial in the relationship between an upstate New York conspiracy to deprive local theater operators of access to films and an attempted corporate take over in New York City.

The "substantial relationship" test is indeed the one that we have customarily applied in determining whether a lawyer may accept employment against a former client. *International Electronics Corp. v. Flanzer*, —— F.2d —— (2d Cir. Dec. 22, 1975), slip op. 1145, 1150; *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975); *Emle Industries, Inc. v. Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973). However, in this case, suit

is not against a former client, but an existing one. One firm in which attorney Fleischmann is a partner is suing an actively represented client of another firm in which attorney Fleischmann is a partner. The propriety of this conduct must be measured not so much against the similarities in litigation, as against the duty of undivided loyalty which an attorney owes to each of his clients.

A lawyer's duty to his client is that of a fiduciary or trustee. *Hafter* v. *Farkas*, 498 F.2d 587, 589 (2d Cir. 1974); *Spector* v. *Mermelstein*, 361 F.Supp. 30, 33 (S.D.N.Y. 1972), *modified on other grnds.*, 485 F.2d 474 (2d Cir. 1973); Wise, *Legal Ethics* 256 (2d ed.). When Cinerama retained Mr. Fleischmann as its attorney in the Western District litigation, it was entitled to feel that at least until that litigation was at an end, it had his undivided loyalty as its advocate and champion, *Grievance Committee* v. *Rottner*, 152 Conn. 59, 65 (1964), and could rely upon his "undivided allegiance and faithful, devoted service." *Von Moltke* v. *Gillies*, 332 U.S. 708, 725 (1948). Because "no man can serve two masters", Matthew 6:24; *In re W. T. Byrns, Inc.*, 260 F.Supp. 442, 445 (E.D.Va. 1966); *Woods* v. *City Nat'l Bank and Trust Co.*, 312 U.S. 262, 268 (1941), it had the right to expect also that he would "accept no retainer to do anything that might be adverse to his client's interests." *Lowe* v. *Gillespie*, 99 Misc. 616, 619 (1915), *aff'd*, 173 App. Div. 889 (1st Dep't 1916). Needless to say, when Mr. Fleischmann and his New York City partners undertook to represent Cinema 5, Ltd., they owed it the same fiduciary duty of undivided loyalty and allegiance.

Ethical Considerations 5-1 and 5-14 of the American Bar Association's Code of Professional Responsibility provide that the professional judgment of a lawyer must be exercised solely for the benefit of his client, free of compromising influences and loyalties, and this precludes his acceptance of employment that will adversely affect his judg-

ment or dilute his loyalty. The Code has been adopted by the New York State Bar Association, and its canons are recognized by both Federal and State Courts as appropriate guidelines for the professional conduct of New York lawyers. *Hull v. Celanese Corp., supra*, 513 F.2d at 571 n.12.

Under the Code, the lawyer who would sue his own client, asserting in justification the lack of "substantial relationship" between the litigation and the work he has undertaken to perform for that client, is leaning on a slender reed indeed. Putting it as mildly as we can, we think it would be questionable conduct for an attorney to participate in any law suit against his own client without the knowledge and consent of all concerned. This appears to be the opinion of the foremost writers in the field, *see* Wise, *supra*, at 272; Drinker, *Legal Ethics* 112, 116, and it is the holding of the New York courts. In *Matter of Kelly*, 23 N.Y.2d 368, 376 (1969), New York's highest court said that "with rare and conditional exceptions, the lawyer may not place himself in a position where a conflicting interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional relationship." Nor is New York alone in this view. In *Grievance Committee v. Rottner, supra*, 152 Conn. at 65, Connecticut's highest court held that the maintenance of public confidence in the bar requires an attorney to decline employment adverse to his client, even though the nature of such employment is wholly unrelated to that of his existing representation.

Whether such adverse representation, without more, requires disqualification in every case, is a matter we need not now decide. We do hold, however, that the "substantial relationship" test does not set a sufficiently high standard by which the necessity for disqualification should be determined. That test may properly be applied only where the

representation of a former client has been terminated and the parameters of [illegible] have been fixed. Where the relationship is a continuing one, adverse representation is prima facie improper. *Matter of Kelly, supra*, 23 N.Y. 2d at 376, and the attorney must be prepared to show, at the very least, that there will be no actual or *apparent* conflict in loyalties or diminution in the vigor of his representation. We think that appellants have failed to meet this heavy burden and that, so long as Mr. Fleischmann and his Buffalo partners continue to represent Cinerama, he and his New York City partners should not represent Cinema 5, Ltd. in this litigation.

Because he is a partner in the Jaeckle firm, Mr. Fleischmann owes the duty of undivided loyalty to that firm's client, Cinerama. Because he is a partner in the Webster firm, he owes the same duty to Cinema 5, Ltd. It can hardly be disputed that there is at least the appearance of impropriety where half his time is spent with partners who are defending Cinerama in multi-million dollar litigation, while the other half is spent with partners who are suing Cinerama in a lawsuit of equal substance.[1]

Because "an attorney must avoid not only the fact, but even the appearance, of representing conflicting interests," *Eddman v. Levy*, 42 App. Div. 2d 758 (2d Dept. 1973) (mem.), this requires his disqualification. *Hull v. Celanese Corp., supra*, 513 F.2d at 571; *General Motors v. City of New York, supra*, 501 F.2d at 649; *W. E. Bassett Co. v. H. C. Cook Co.*, 201 F.Supp. 821, 825 (D.Conn.), *aff'd*. 302 F.2d 268 (2d Cir. 1962) (per curiam). Moreover, because of the peculiarly close relationship existing among legal

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1 Mr. Fleischmann's personal participation in the Buffalo litigation was minimal, and we are confident that he would make every effort to disassociate himself from both lawsuits and would not divulge any information that came to him concerning either. However, we cannot impart this same confidence to the public by court order.

partners, if Mr. Fleischmann is disqualified, his partners at the Webster firm are disqualified as well. *Lasky Bros., Inc. v. Warner Bros. Pictures, Inc.*, 221 F.2d 824, 826 (2d Cir. 1955), *cert. denied*, 350 U.S. 832 (1956); *American Can Co. v. Citrus Feed Co.*, 436 F.2d 1125, 1128 (5th Cir. 1971); *Estep v. Johnson*, 383 F.Supp. 1323, 1325 (D.Conn. 1974).

Nothing that we have heretofore said is intended as criticism of the character and professional integrity of Mr. Fleischmann and his partners. We are convinced that the dual representation came about inadvertently and unknowingly, and we are in complete accord with Judge Brieant's finding that there has been no actual wrongdoing. Furthermore, the records show that after learning of the conflict which had developed, the Jaeckle firm, through Mr. Fleischmann, offered to withdraw its representation of Cinerama in the Western District actions. However, that offer was not accepted, and Mr. Fleischmann continued, albeit reluctantly, to have one foot in each camp.

Under the circumstances, Judge Brieant's order of disqualification cannot be construed as an abuse of his discretion. We therefore affirm.

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C. Orvis Sowerwine, Trustee
REA Express, Inc., Bankrupt
150 East 42nd Street
New York, New York 10017

July 20, 1976

Arthur M. Wisehart, Esq.
Wisehart, Friou & Koch
150 East 42nd Street - 4th Floor
New York, New York 10017

Dear Arthur:

I have just finished reading your memorandum in response to my counsel's memorandum concerning your Chapter X petition, and have realized for the first time that in presenting this petition you are not representing REAEMCO, but yourself - presenting your own recently discovered (or, at least, recently disclosed) views that REA should never have gone into bankruptcy and now should be revived, with the assets it now has being put to risk in the hope that someday its creditors will be paid in full, or their claims compromised, and it will be returned to its stockholders.

From the earliest moments of my trusteeship, I have tried to be more than fair, utilizing your services where I could - not because of our long-standing friendly relationship and not just in the litigation which you had created and as to which you had unique knowlege and experience, but because I felt your long experience with REA would be helpful in the many matters that would arise and especially in what I recognized as the most important part of my task, realizing the maximum value from REA's operating rights. Accordingly, I continued a most unusual retainer for your firm, with the trust estate absorbing all your expenses plus a generous retainer, and more recently approved a generous charge for your time, over strong objections from many sources.

I felt that no conflict existed at the time you became counsel to REAEMCO between your representation of that company and continuing to represent me. Thereafter, I was willing to overlook (though I have been totally unable to understand how you could overlook) the clear conflict that arose once I, as Trustee, had made the very difficult - even painful - decision to recommend the All-trans proposal in preference to the REAEMCO proposal. I could even

EXHIBIT C

overlook your personal attacks upon me during the hearing as the excessive zeal of an advocate.

Now, however, with no excuse of a duty to a client whose representation by you I had previously approved, you have chosen to take a course in direct opposition to mine as Trustee, because you now disagree with my view expressed from the outset that the trust assets could not again be exposed to the risks of the express business. Not satisfied with disagreeing with this view, you have now seen fit to charge me with bias (though why I should be biased against REAEMCO and in favor of Alltrans is beyond my understanding) and, most important, to impugn my personal integrity.

Under these circumstances, I do not see how you can continue to represent me in any way. Accordingly, you are hereby instructed that your firm's retainer is terminated. All matters other than the railroad litigation are to be turned over as soon as possible to Whitman & Ransom. We will have to work out with Bob Wright and Judge Galgay just what should be done concerning the railroad litigation.

After I have received proper affidavits from your firm as to services performed prior and subsequent to April 6, 1976, an application on notice for an allowance for services to date will be submitted to the Court for approval. If no affidavit or affidavits are received by me before July 29, 1976 I will not submit any such application to the Court for consideration.

Effective August 1, the trust estate will no longer pay any of your expenses and from that date you will be charged with your portion of the rent (on the basis of square footage occupied) for the space you occupy. Even though I have committed for rent for that space, you have my permission to move to other quarters (and, in fact, I would prefer this).

Arthur, I can only say that I deeply regret that you have forced me to this decision.

Sincerely,

C. Orvis Sowerwine

cc: The Hon. John J. Galgay
Marcus & Angel
Whitman & Ransom

WISEHART, FRIOU & KOCH
FOURTH FLOOR
150 EAST 42ND STREET
NEW YORK, NEW YORK 10017

TELEPHONE
(212) 557-6666

2724

July 30, 1976

C. Orvis Sowerwine, Esq.
Trustee
REA Express, Inc., Bankrupt
150 East 42nd Street
New York, New York 10017

Dear Mr. Sowerwine:

As you know, this firm has provided an affidavit covering services to April 6, 1976, in accordance with your request, and will provide another affidavit or affidavits for subsequent services in due course, as stated in our letter to you of July 28, 1976.

In further clarification of this firm's situation in the light of your letter of July 20, 1976:

1. We will continue to retain our present premises subject to reaching agreement on the value of the space. You will be credited for the value of the space and the clerical services performed against the amounts owing this firm. We continue to assert our lien on the furnishings, books and files, but are willing to compromise on individual items on a no-prejudice basis in accordance with our discussion on July 28, 1976.

2. It is our understanding that our rights and interests regarding REA's major litigation will not be infringed; that we will be promptly informed regarding any developments or issues regarding those cases as they arise, and our views will be considered. You will so advise other counsel involved.

3. It is our further understanding that our status as co-counsel to Mr. Wright in the railroad Notes case will be continued and that we will be compensated by you as Trustee for our services, costs and expenses on a timely basis.

4. In the Travelers case, you have received our letter of July 16, and Mr. Wright's letter of July 22, 1976. Based upon those letters, I would expect that your counsel will submit for Judge Galgay's approval an appropriate order

EXHIBIT D

so that the action approved by Mr. Wright can be implemented prior to September 7, 1976, which is the date on which our brief is due. It obviously is not desirable to permit our adversaries to raise questions about whether the case is being pursued in the interest of the bankrupt estate. The interest of the creditors is an important argument to us in seeking to overcome the Bangor Punta defense. Mr. Wright is available to discuss this with you. As we are beginning to invest substantial amounts of time on this appeal, I will assume that before you leave you will instruct your counsel to prepare for our prior review and submit to Judge Galgay an appropriate order.

5. With respect to the time expended by this firm in answering inquiries or in making suitable transition arrangements, we will expect to be compensated by you as Trustee for the value of our time and reasonable costs and disbursements.

None of the foregoing is intended to indicate this firm's concurrence in the substance, action, manner or means reflected in your letter of July 20, 1976, or prejudice our right to claim damages resulting from the precipitate action reflected thereby. We believe that such action is imprudent, contrary to the best interest of the bankrupt estate, and in excess of your powers, and that the abruptness thereof is certainly not compatible with the manner in which lawyers should be treated who have worked long, hard and effectively in the interest of the bankrupt estate in connection with some of its most important assets.

The fact that you and we now perceive the interest of the bankrupt estate in a different way regarding our REAFMCO representation should not be permitted to obscure this fact, particularly when the situation leading to this difference was one which developed certainly with your approval and, we believe, at your request. You had yourself agreed to a cooperative working arrangement in the development of the REAFMCO proposal, which, as you know, we believe you breached, while we have continued in accordance with the original understanding and the professional commitment by us which grew out of it. The REAFMCO proposal grew out of sincere professional advice given to you by one with considerable experience in the field as the best means to preserve and perfect RIA's extended and very valuable surface rights -- a view which continues to be shared by disinterested other parties knowledgeable in the same field.

Although the REA-TMCO proposal has not been adopted to date, an appeal remains pending. Whatever the outcome, the REA-TMCO proposal already has conferred a great benefit on the bankrupt estate by (1) developing the interest of others in REA's rights, (2) providing the design followed as to the basic nature of the type of proposal to be made for their acquisition, (3) developing detailed plans for how express operations might be revived profitably by a man generally recognized as one of the leading and most experienced transportation executives in the country, and (4) providing competition resulting in substantial increases in what was offered for the rights.

Finally, your statement of position that "the trust assets could not again be exposed to the risks of the express business" -- a position with respect to which you say I have taken a course in direct opposition "with no excuse of a duty to a client" -- deserves a reply. First, REA-TMCO proposal does involve a client relationship. It entails the belief, which I think is well-founded, that the largest creditors in interest are REA's former employees, and that one of the principal objectives of the bankrupt estate therefore should be to restore their jobs and employment benefits. The employees' interests are founded on approximately $10 million pre-Chapter XI claims, which are undisputed, as well as their disputed post-Chapter XI claims. In such a situation, it would seem that a fiduciary would seek to ascertain the desires of his beneficiaries, not to espouse adamant positions without consideration of their views. The Bankruptcy Act and Rules repeatedly require major policy matters to be submitted to the creditors so that their views can be ascertained. You have not done this.

In the recent hearing, the only creditor interests represented were opposed to the Alltrans proposal favored by you and your counsel. In such a situation, a position taken by a Trustee which has not been referred to his beneficiaries for approval, and which is in fact opposed by all of the creditors in person or represented at the hearing, is essentially ultra vires.

Second, the undisputed testimony at the recent hearing was that REA's rights have great potential value. Indeed, in your closing statement, you said that, if REA's authorities were permanent, "I concur with the view expressed by Mr. Nogg and others that the rights would be worth from $50 to $100 million." (Tr. Jul. 9, 1976, p. 167.) In the face of that, I hope you will not regard it as presumptuous to say that the prudence of failing to use any of the over $6 million already collected from the disposition of REA's assets on keeping those rights alive by expanding and resuming express operations is not free from doubt. This seems particularly so when, by failing to do so, you make it unlikely that the pre-Chapter XI creditors will receive anything. As opposed to this, under the REAEMCO proposal, with modest capitalization, the pre-Chapter XI claims eventually could be paid in full. This is of course based upon Mr. Nogg's analysis and testimony. But the only testimony in opposition to this was that of Mr. Fauth, a man who, unlike Mr. Nogg, has never run a successful transportation business, has never been a successful bankruptcy trustee, has no standing as a financier, and who appeared to testify only at the behest and bidding of Alltrans, an interested party seeking to make immense profits from REA's rights.

It is true, of course, that Mr. Nogg also testified on behalf of an interested party. But Mr. Nogg made it clear that his interest is not in making immense personal profits, but in employee ownership. Further, REAEMCO was not necessarily an adverse party. You once embraced and supported Mr. Nogg's views, and agreed to work cooperatively in the development of the REAEMCO proposal. You therefore can hardly now say that the proposal was not feasible. Nor can you credibly say that $3 million would not be adequate capitalization for it -- that is the figure at which you and Mr. Nogg jointly arrived. Thus the remaining need was for the $3 million. If the commitment from Mr. Karl Smith to supply that sum was not free from doubt, as you subsequently concluded, then it seems to me that the natural thing would be to put to REA's creditors the question whether they wanted any part of the $6 million already collected from REA's assets used in that way, and it should not be deemed to be a mortal sin to say so.

Sincerely,

Arthur B. Winchart

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

REA EXPRESS, INC., Plaintiff -against- THE ALABAMA GREAT SOUTHERN RAILROAD CO., ET AL., Defendants	71 Civ. 4278 (W.K.; Three-Judge Court) AFFIDAVIT OF A. ERNEST LARSEN IN OPPOSITION TO RAILROADS' MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

A. ERNEST LARSEN, being duly sworn, deposes and says:

1. I am Treasurer and Controller, and a Director of REA Express, Inc., plaintiff in the above action. I have been employed by REA in various financial capacities for over 27 years and I have personal knowledge of the matters stated herein. Prior to my employment with REA, I was a special agent of the FBI and an auditor.

2. In addition to my years of experience with REA, I have actively assisted in the development of the information presented on behalf of REA in reopened Finance Docket 28612 before the Interstate Commerce Commission. Annexed to this affidavit are true copies of the verified statements submitted for REA in that proceeding:

(a) The first, by Dr. James R. Nelson, Charles E. Merrill Professor of Economics, Amherst College, deals among other things with how the activities of the railroads (i) forced REA to

pay abnormally high rates of interest upon unilaterally imposed "advances" beginning in 1929 (pp. 7-10), in violation of their fiduciary duties, and (ii) combined to impose other trade restraints upon REA which prevented realization of the underlying purpose of the 1959 Standard Express Operations Agreement, upon which depended REA's ability to generate profits needed to pay off the 1959 Notes, particularly with respect to freedom of routing (pp. 29-35).

(b) The verified statements of Lester R. Burke and William J. Roche, former employees of REA, described how the railroads influenced REA's pricing policies in favor of their own customers, the forwarders, and prevented REA from becoming truly competitive, also contrary to the purpose of the 1959 agreement.

(c) Following the verified statement of Mr. Roche, discussing the situation from the standpoint of one inside the company, I have annexed memoranda dated March 9, 1961 and July 7, 1961, received from railroad sources, referring to a private price-fixing understanding between the railroads and the forwarders. The understanding, forced upon REA, was that in the future REA would not publish any rates as low or lower than existing forwarder rates for competitive traffic. These and related memoranda also have been submitted to the Interstate Commerce Commission, but the railroad parties have asked that they be rejected on grounds of relevance to that proceeding. What the documents show is the existence of a conspiracy between the railroads and the forwarders resulting in price-fixing to the advantage of the forwarders and railroads, and to the detriment of REA, and further frustrating the profit-objectives of the 1959 agreement.

(d) The memoranda are followed by my own verified statement in which the accounting treatment of the non-negotiable debt and interest thereon is discussed.

(e) The verified statement thereafter is that of L. John Eichner, an expert witness, analyzing the accounting and financial aspects of the non-negotiable debt and the 1929 bonds. It shows that, should REA now pay the 1959 Notes and accrued interest thereon, the total expenditure would be in excess of $124 million paid from express revenues since 1929 for the purpose of acquiring a property with a valuation of only slightly over $30 million (pp. 11-12). Attachment 1 shows that the total interest payments were $43,284,976. Since the issuance of the 1959 Notes, REA has paid the railroads a total of $15,099,837 in interest. Mr. Eichner's verified statement shows that excessive amounts REA was forced to pay the railroads contrary to the out-of-pocket c sts required in the 1959 agreement totaled $44.8 million net (Attachment 12), and the continuing impact of these activities is demonstrated (pp. 32-33). Following the sale by the railroads of their REA stock in August 1969, $2,040,479 of the interest was paid. Over $4 million in post-sale interest and the principal of over $27 million remain unpaid.

(f) Mr. Eichner's verified statement is followed by his verified reply statement and my own verified reply statement in which I set forth comparisons between the interest paid on the non-negotiable debt and other interest rates paid by REA, showing that the interest rates fixed by agreement among the railroads substantially exceeded REA's cost of borrowing elsewhere. That is followed by the verified statement of V. Madeline Stratenwerth,

Corporate Secretary of REA, and a copy of REA Exhibit 62, a confidential report made by the management consulting firm of Booz, Allen & Hamilton estimating that the railroads' costs if they followed their original plan of terminating REA in 1959 might have been as high as $700,000,000 to $800,000,000.

On the basis of the foregoing, I hereby verify, incorporate by reference, and adopt as my own, the statements of fact set forth in paragraphs 8 through 22, 35, and 44 through 48 of REA's Third Complaint filed herein, a true copy of which is annexed hereto. In addition, based upon the particulars set forth in my verified statement of October 3, 1974, it is my belief, and REA's contention, that the railroads' concerted and coercive action in preventing REA from utilizing the deductions specified therein authorized under the 1929 Express Operations Agreement, in determining the amounts paid to the railroads, constituted price fixing with respect to the sale of their services to REA (see verified statement of L. John Eichner, p. 8).

3. The submission on behalf of REA Express, Inc. in the reopened Docket 20812 before the Interstate Commerce Commission establishes that the railroads' original intention in 1959 was to liquidate REA. REA's chief executive was forced to retire, his logical successor from within the Express Company was not promoted, and Mr. W. B. Johnson was hired from the Pennsylvania Railroad in February 1959 as REA's President primarily for the purpose of liquidating the Express Company with the expectation that he would thereafter return to the railroad industry. The management consulting firm of Booz, Allen & Hamilton was retained at about the same time to prepare a plan of liquidation. The railroads were diverted from doing this directly, however, when

they discovered, based upon the confidential analysis by Booz, Allen & Hamilton that their obligations to the employees for pensions and contingent termination liabilities not reflected on REA's books, would subject the railroads to costs estimated to be hundreds of millions of dollars.

When the termination of the Express Company turned out to be not feasible because of the costs to the railroads, Mr. W. B. Johnson and the others concerned immediately turned their attention to the possibility of selling the company. After Mr. Johnson became REA's President on March 1, 1959, he had developed firm offers to purchase REA from both Lehman Brothers and Mr. Morris Forgash. At the Board of Directors meeting on June 2, 1959, Mr. Johnson presented the Lehman Brothers proposal to the Board with the recommendation that it be accepted, but the railroads rejected it. The proposal of Mr. Forgash was next presented to the meeting, with a recommendation of acceptance, and it, too, failed to carry. The pertinent documents produced in discovery in the reopened proceeding before the Interstate Commerce Commission show that the idea of issuing notes to reflect the so-called non-negotiable debt was developed in connection with these proposals, in contemplation of the sale of the company. When the proposals of Lehman Brothers and Mr. Forgash, as recommended by Mr. Johnson, failed to carry, the plan of issuing notes was carried over and linked to the development of the 1959 Standard Express Operations Agreement, which was devised so that REA could earn profits. The sale of the company remained an active project, however. A proposal by the Greyhound Corporation to purchase the company was made in January 1964. Later it was modified to substitute a proposal for the purchase of a substantial block of the stock.

This led to litigation which carried it up to the Supreme Court (Denver & Rio Grande Western Railroad Company v. United States, 387 U.S. 485 (1967)), and the transaction was terminated in June 1967. The sale of the company continued as a dominant objective, however, and a brochure dated August 30, 1967 was prepared for that purpose. Additional offers to purchase the company were made by Walter E. Heller & Co. (October 25, 1967), the Marmon Group (December 5, 1967), and Data Processing Financial & General Corporation (December 21, 1967). When these offers came to nothing, the railroads put their stock in a voting trust for the purpose of selling the company. This action was recommended at the Board of Directors' meeting in April 1968. In the same month, it was stated that termination of the 1959 Standard Express Operations Agreement would be a precondition of the voting trust, adding substantially to REA's operating costs (see Mr. Eichner's verified statement, p. 33), and the railroad-oriented management of REA at the same time applied to the Interstate Commerce Commission for new surface operating authority of a kind designed to make it dependent upon the continued use of the rails' freight services in large segments of the country.

-- 4. Meanwhile, returning to the period in 1959, what the railroads could not do directly and instantaneously in the way of terminating and dismembering the Express Company they combined to do gradually and indirectly. REA today is merely an emaciated specter of what it was in 1959. Total employment has dropped from over 40,000 to less than 8,000. The railroads were responsible for this largely through activities which were contrary to both the purpose and terms of the 1959 agreement, and never approved by the ICC. Such activities are corroborated by the testimony of

Mr. Albert V. Casey, who had been one of REA's top financial officers and is now Chairman and Chief Executive Officer of American Airlines, Inc. in the case of Douglas Leigh, Inc. v. Railway Express Agency, New York Supreme Court, New York County, Index No. 13894/69 on March 30, 1971 (Tr. 12-14):

"You told Mr. Johnston you were employed by REA starting in the spring of 1961. How long were you with REA, sir?

A I think it was May '61 to September 15, 1963.

Q A period of about 18 months?

A It would be more than two years, wouldn't it?

Q What occasioned your leaving REA, sir?

A I had a certain difference of opinion with the board of directors of REA.

Q And what was the subject of the difference of opinion?

A I will try to be brief, because it is an involved one.

On July 1, 1961, REA went on its own, so to speak. Before that it had been Railway Express Agency, and whatever the deficit was, it was allocated out to the railroads.

After July 1, 1961, we had a fixed rate the railroads charged us for carrying the packages, the express service, so to speak. It was a bargain rate and whatever profits were left over, we split with the railroads.

Now, we had been operating at a 38 to 40 million dollar deficit annually. Under the new arrangement, and after splitting with the railroads, we made about $4,000,000 the first year.

Now, that isn't very much on a gross that exceeded $400,000,000. It was less than one per cent return.

The railroads, when they saw us making that profit, suggested that the basic contract be changed, so that REA would not make that four

million, it would flow to the railroads. If they did that, we would not have any credit to get money from insurance companies and banks to update the facilities of the railroad and be ongoing, we wouldn't get our depreciation cash, if you follow me, as well.

Q Without that income, you wouldn't be in a position to borrow?

A We would not be in a position to borrow.

So I said, if you change the contract and remove our profitability, I shall leave. This did not deter them from furthering the discussions along that line and they assured me that such would be the case; so I left." (Emphasis added.)

I assume that what Mr. Casey had in mind were subsequent changes required by the directors in the accounting practices contrary to the terms of the agreement rather than formal changes in the contract itself. For example, although REA's obligation was to pay the railroads only "out-of-pocket" costs for their services, a 2.5% element for return on investment was required by the railroads to be added. As shown in Mr. Eichner's verified statement this amounted to $17.5 million between 1963 and 1968 (p. 27), and represented a windfall to the railroads not envisioned in the 1959 agreement. Other accounting practices forced upon REA by the railroad directors, over the opposition of REA's management, included the use of a formula for computing out-of-pocket costs at the level of 74% of fully allocated costs even though REA's own engineering studies indicated that the factor used should have been 70%, and Mr. W. B. Johnson so stated in a letter dated June 28, 1961. Mr. Eichner's verified statement shows that the additional revenue received by the railroads as a result of this amounted to approximately $19.6 million between 1963 and 1968 (p. 29). Further, the railroads insisted that the costs of

commuter operations be included in determining the out-of-pocket costs attributable to express, even though railroad expenses for commuter operations were not in any way a part of express costs. For the period between 1963 and 1963, Mr. Eichner's verified statement shows that this added approximately $13.8 million to REA's costs for the Eastern Group of railroads alone.

Many of the railroads' activities aimed at REA I was unaware of prior to discovery in the proceedings before the Interstate Commerce Commission. Others, of which I was aware, could not be adjusted because of the unyielding position of the railroads and their domination of REA's management. When the railroad nominees in REA's management had accomplished their purposes with REA, they returned to the railroad industry in top positions, leaving behind them a continuing series of arrangements which could not possibly be uncovered initially by outsiders coming into the company, or even, at the time, by insiders exposed only to isolated segments of the overall plan. The nature and effect of these activities were continuously misrepresented or not disclosed to the Interstate Commerce Commission as shown in the verified statements annexed hereto.

-6. Mr. Casey's testimony refers to the 1959 Standard Express Operations Agreement between REA and the railroads. That agreement was to provide the profits by which the Notes would be paid, running until December 1973. However, the railroads, prior to establishing a voting trust for the purpose of selling the company, caused the agreement to be amended to terminate at the end of 1968. This added millions of dollars a year to the costs of REA, and was never approved by the Interstate Commerce Commission.

7. I disagree with the implication in the affidavit

dated February 15, 1972 of Mr. Owen Clarke that the railroads terminated the 1959 agreement for the benefit of REA. They terminated it for their own benefit. In the first place, the 1959 agreement committed the railroads upon withdrawal to sell their REA stock "at original cost", which would have been a total of not more than $100,000 for the entire company. Further, under the 1959 agreement, REA was required to pay only out-of-pocket costs to the railroads for their services.* By terminating the agreement, the railroads intended to implement their plan of requiring REA to pay more than fully allocated costs for their services. They also sought to evade their duty to participate in providing Express service in accordance with their common carrier obligations. Finally, by terminating both the 1954 and 1959 agreements prematurely, the railroads intended to evade and avoid their obligations to REA's employees, most of whom had spent their entire working years in the service of the Express Company while it was wholly owned by the railroads. The railroads had reaped the benefits of their services but, as described in more detail later, had failed to make adequate provision for such employees, making their future security and welfare dependent upon a company that was left virtually without capital.

8. Mr. Clarke's affidavit says that throughout the period of his first-hand knowledge, the railroads were providing rail transportation services at a loss to themselves. The statement is misleading, however. In fact, as demonstrated in Mr. Eichner's Verified Reply Statement (p. 25), without the revenues from the Express business, the passenger train losses experienced by the railroads would have been much higher. Attachment 3 to my verified statement to the Interstate Commerce Commission shows

*They also would receive an additional amount out of pre-tax profits but this was illusory because REA was not making profits at the time of termination.

that the railroads' revenues from the 1959 agreement exceeded their out-of-pocket costs plus an element of 2-1/2% for return on investment by nearly $20 million for the period 1959-1963. In addition, the railroads continued to receive from REA interest on a fictitious debt resulting from a price-fixing conspiracy and on notes issued without consideration.

9. At the time of the sale by the railroads of their stock, the increased costs attendant upon the premature termination of the 1959 agreement could not be estimated in any meaningful way and, on information and belief, when the railroads sold their stock, they misled the newly-recruited management of REA into thinking that the termination of the agreement was for its benefit, and did not tell them that substantial increases in REA's costs would result.

10. Reviewing the turbulent and traumatic experiences which REA had been through, particularly beginning in 1959, it is apparent that the railroads avoided selling the company when it was still strong enough to be a healthy competitor, in large part because of a desire to protect their own competitive interests, and decided to do away with the company by gradually draining off its capital, until its weakened condition combined with a number of anti-competitive restraints, would make its eventual liquidation virtually certain, while the railroads' responsibility would go undetected by virtue of the complexity of the measures used, the non-disclosure of significant aspects thereof, and the general manner in which they were applied.

12. As of July 5, 1968, REA had a total of 1,999,188 shares of stock outstanding, all owned by the railroads. Between that date and October 1969, the shares outstanding were increased

by 26%, none of which went to the railroads. The additional shares were issued to the voting trustees (180,000), to McKinsey & Co. for management consulting services (100,000), to S. D. Moseley in return for his agreeing to come in as President (37,500), and to officers and key employees under the Stock Participation Plan approved by the Commission on November 5, 1968 (210,000). Before the end of 1969, all of these additional shares, or over 20% of the total, were acquired by REA Holding Corporation and by REA Express, Inc., each of which received all right, title and interest of the stockholders in question. In the case of the stock issued under the Stock Participation Plan, REA Holding Corporation exchanged its shares for the stock of REA Express, Inc. on a share-for-share basis; the other shares were acquired by purchase.

13. When REA filed a petition under Chapter XI of the Bankruptcy Laws on February 18, 1975, it had assets of approximately $44 million, liabilities of approximately $55 million, or liabilities of $11 million more than its assets (not including the $27 million in notes held by the railroads). Since then, the excess of liabilities over assets has grown to more than $20 million. Thus it is clear that the prime beneficiaries of any recovery in this case would be REA's creditors and employees (as well as the shippers who are dependent upon its services).

14. In addition to the liabilities shown on REA's books, if the company is forced out of business the jobs of its approximately 8,000 employees will be lost, the great majority of whom are over 50 years of age and in present circumstances would have great difficulty finding suitable alternative employment. In

addition, their health, medical, and life insurance benefits would be terminated, and the life insurance for over 6,000 retired employees would be at an end, as would the pensions which in the case of a large number of retired employees are unfunded. Also, because of the company's extreme financial need, the wages received by REA's employees have been reduced by 10 to 30% since REA's Chapter XI filing on February 18, 1975, and many of the wage rates were already substandard. Finally, substantial infusions of capital are needed to restore and replace the company's equipment and facilities.

15. The railroads contend that recovery by REA in this case would be a windfall to the stockholders. I disagree with this contention. First, the real windfall would be to the railroads if they are permitted to retain monies which belonged to the Express Company over the years and were converted by the railroads to their own use. Second, the real beneficiaries of any recovery would not be stockholders, but REA's creditors and employees. With a substantial recovery from the railroads of monies to which they were never entitled, REA not only will be able to address the valid claims of its creditors but also the interests of its employees and retired employees, most of whom spent the major part of their careers working for REA at a time when it was wholly owned by the railroads, and to restore its equipment and facilities. Equitable principles in this case therefore support the recovery which REA seeks.

A. Ernest Larsen

Sworn to before me
this 30 day of May, 1975

Notary Public

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New York, March 9, 1961
AGTM-1280-MJ

MEMORANDUM

Prior to the REA Express board meeting on March 7 a preliminary meeting was held in Room 535, Biltmore Hotel, at which following were present:

Mr. C. E. Peterson, VP-System Passenger Traffic-Public Relations, Southern Pacific Company

Mr. J. R. MacNally, VP-Traffic, Union Pacific Railroad

Mr. R. G. Rydin, VP, AT&SF Railroad

Mr. R. W. Downing, VP, Great Northern Railway

Mr. Morris Forgash, Chairman, U. S. Freight Company

Mr. T. R. Bartels, President, Republic Carloading Company

Mr. George Leonard, General Counsel, Acme Fast Freight, Inc.

Mr. C. E. Ward, AGTM, Southern Pacific Company

Mr. Forgash spoke at some length about the inequity of the manner in which REA Express has been establishing rates for freight shipments in passenger train service. He expressed particular concern that REA had been permitted to set charges below forwarder rates on the individual commodities of a freight nature on which type traffic railroads were presently receiving from the freight forwarders published tariff rates. He said very definitely that railroad owners of REA should take a good look at what President Johnson is doing and offered the further comment that he felt surely the railroads should ask themselves the basic question if REA handled all forwarder traffic would they (the railroads) make any money. He said the answer obviously was no.

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Mr. Forgash said he thought Mr. Johnson should be asked

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bluntly whether he can make a profit or even break even on REA package traffic, and said his own answer is that it is hopeless to attempt to run a profitable REA Express on packages alone.

He said there is not one iota of doubt in his mind that President Johnson of REA wants to sell the operation and that he (Johnson) does not believe he can get anywhere with the present organization under railroad ownership.

Mr. Forgash recommended for consideration the combination of REA and freight forwarders into one company under which he feels very sure the trucks could be driven out of business for distances of over 600 miles. He said further that such a combination could double the business now being handled by forwarders and REA combined.

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During the afternoon of March 8, Mr. Peterson came to the office to explain the further action that was taken the previous afternoon in connection with REA incentive rates, which was that following the board meeting Messrs. Peterson, McAnally, Aydin and Deming conferred privately with President Bill Johnson of REA. Understanding was reached with Mr. Johnson that as a policy matter REA would not publish any more rates as low as or lower than existing forwarder rates for comparable traffic. In other words, any future rate adjustments will be on a level higher than forwarder rates. Mr. Johnson also promised to look into the REA rates already published which are lower than forwarder rates. Mr. Peterson stated that he had personally informed Morris Forgash, Tom Flynn and Ted Bartels of the understanding reached with Mr. Johnson and that all three

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N.Y., March 9, 1961

expressed appreciation and satisfaction with the action taken.

As to Mr. Fortsch's suggestion for merging IEA and forwarders, Mr. Peterson said that Messrs. Flynn and Bartels, with understanding they were not making any commitment, expressed no off-hand objections to the proposal. Mr. Peterson will discuss this question with Mr. Peoples and Mr. Russell on his return to San Francisco.

C. E. WARD

cc

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VP:

July 7, 1961

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Mr. Larson:

Our conversation yesterday regarding Western Carloading Company and inquiry of Mr. Peoples concerning cotton good rates of Express Agency:

Mr. Peoples and other railroad Vice Presidents met in New York with the principal freight forwarders in connection with the general manner of Express Agency rates.

Following this meeting the Western Directors of the Express Agency on March 10 met with Mr. Forgash, Leonard representing Acme, and Bartels representing Republic. The Western Directors in attendance were Deming, Great Northern; Rydin, Santa Fe, MacInally, UP; and Ward and Peterson, SP. After this meeting the Western Directors of the Express Agency met with Mr. Johnson. This was the result of my verbal conversation with Mr. Peoples and his letter of March 2 wherein Mr Peoples said "strong representation should be made to Mr. Johnson of the REA against that Agency publishing any rates which would be lower than freight forwarder rates for comparable traffic." It was understood with Mr. Johnson that under no circumstances should REA rates be as low as or lower than freight forwarder rates for comparable traffic. At the time of this understanding there was in process a hearing before the ICC concerning the matter of the cotton good rates, which hearing was the result of the freight forwarders asking the ICC for suspension. In discussion with Mr. Johnson it was the view that the hearing on the cotton good rates had progressed to the point where testimony had been taken and it was difficult if not impossible to "back up." This was explained to Messrs. Bradly, Flynn and Forgash at the time and they understood the situation.

Therefore, so far as I know, since that meeting there have been no new instances of Express Agency rates being made lower than forwarder rates. The Commission decided not to suspend the cotton good rates; therefore, they are in effect. However, if there are particular places or particular [illegible] movements where they are cutting the freight forwarders

Western Carloading Company will let Mr. Peoples know just where their problem is, I will handle those particular instances with the Express Agency to see what can be done. If this is not entirely clear, let me know and I will try to amplify.

I can say this, that on my recent trip to New York and long conversation with both Forgash and Bradly, Sr., they had no new instances of Express Agency cutting their rates and if the cotton good rates which the ICC did not suspend are hurting our friends in particular cases or places I may be able to do something about it if I can get the details. I am keeping no copy of this memo.

C. E. Peterson

C. ORVIS SOWERWINE
Trustee in Bankruptcy
REA EXPRESS, INC., Bankrupt
150 East 42nd Street
New York, N.Y. 10017

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May 17, 1976

The Honorable John J. Galgay
Bankruptcy Judge
United States Court House
Foley Square
New York, N.Y. 10007

My dear Judge Galgay:

I wish to bring to the attention of the Court certain developments relating to my qualifications as Trustee in the matters of REA Express, Inc. and related companies ("REA"), specifically as they respect any possible conflicts of interest. Chronologically these developments are as follows:

On April 7, 1975, Stuart D. Baker, a partner of Chadbourne, Parke, Whiteside & Wolff, counsel to several airlines which are creditors of REA, asked if I would consider being a Standby Trustee for REA which at that time was in Chapter XI. He stated that a Creditors Committee would be designated the next day and that its first business would be the nomination of a Standby Trustee who would have no functions or responsibilities until and in the event that REA was adjudicated a bankrupt. I had formerly been a partner in the Chadbourne firm. At that time I was, and still am, an officer of Shearson Hayden Stone Inc., investment bankers and members of the New York Stock Exchange, where my responsibilities were in the Corporate Finance Department. I specialize in analyses of corporations with a view to assisting in public and private financings, mergers and acquisitions. I have had considerable experience in the general area of analysis and evalutation of corporations and in representing buyers and sellers of corporations. I agreed to serve, it being my understanding that should I become the Trustee, my duties would be of limited duration and would not require the major part of my time.

I think it appropriate to add that Shearson Hayden Stone is a large, publicly-held firm conducting its business throughout the United States and in the major financial centers of the world. I own less than one-tenth of one percent of its outstanding equity. The firm is engaged in financial matters respecting a wide variety of business activity.

I was duly selected by the creditors of REA on April 8th, unanimously I am informed, and designated by the Court as Standby Trustee. I did not meet any member of the Creditors Committee or any of their counsel until July 29, 1975. REA was adjudicated a bankrupt on November 6, 1975, and I qualified as its Trustee effective the next day.

As I noted, various railroads were among the major creditors of REA and as such asserted their rights in connection with this proceeding. The obligations to the railroads apart from the "notes" are generally acknowledged. Prior to being in Chapter XI, Arthur Wisehart was an officer and general counsel and a principal stockholder of REA. In 1971, Mr. Wisehart advised REA to bring treble damage claims against a number of railroads, being generally the principal railroad creditors of REA. He later formed a separate law firm known as Wisehart & Koch and initiated and pursued those claims in various courts under a retainer agreement which provided, in addition to the retainer, for a contingent fee. They have all been decided adversely and are now pending on appeal. In view of his connection with the equitable interest in REA, it was clearly not appropriate for Mr. Wisehart's firm to represent the Trustee in Bankruptcy. On the other hand, in view of my responsibility to pursue all claims of the bankrupt estate, it was necessary to have effective and objective legal representation respecting such claims which were against some of the major creditors of the bankrupt estate. Accordingly, on the Court's recommendation, Robert L. Wright was selected to handle these claims; and, in view of Mr. Wisehart's intimate knowledge of them, his firm was designated to assist Mr. Wright. Wisehart & Koch were apparently completely dependent upon REA; and, therefore, I have retained them at the suggestion of the Court for a limited period so that they would continue to be available to the bankrupt estate.

The next development was on March 9th at a meeting with Your Honor in chambers. A purpose of the meeting was to discuss the contention of Mr. Wisehart that the two law firms designated by the creditors, Whitman & Ransom and Marcus & Angel, had possible conflicts of interest in respect of REA's litigation against the railroads. At that meeting, I raised with the Court and those present, including Messrs. Wisehart and Friou, who had just joined the firm, as well as Messrs. Kahn and Wallace of Whitman & Ransom and Mr. Angel of Marcus & Angel, certain

information that I had sought out following Mr. Wisehart's allegations respecting the counsel. It appeared that my firm Shearson Hayden Stone, through its Railroad Department, had advised various railroads including the Milwaukee Road, the Burlington Northern, the Bangor and Aroostock, the Missouri Pacific, and the Penn Central, all of which are defendants in the various litigations brought by REA. It appears that Mr. Wright will make some recommendations to me as Trustee to submit to the Court for approval concerning these litigations and the question I raised was, in passing them on to the Court, whether I should indicate my own recommendations in view of this connection. I gathered the general conclusion at the meeting to have been that these matters should not inhibit my full and effective participation as Trustee respecting the railroad litigations. The Court then advised that I should consult with my counsel and, if I felt I still had a problem, they would advise me as to how to bring it formally to the Court's attention.

On April 13th, while discussing a variety of REA legal problems with Messrs. Kahn, Wallace, Angel and Bell, I asked them whether they thought there was any need to pursue the matter of my participation in respect of the railroad claims. Their thought was that since I had raised it, it would be best to have a written opinion although they didn't see that there was any problem at all. Because question had been raised concerning possible relationships of their firms with certain of the railroads, it was thought best that I obtain the opinion of Mr. Friou who had been at the meeting and was familiar with the problem. I saw Mr. Friou that afternoon and gave him the specific details of the activity of Shearson Hayden Stone as advisor to some of the railroad defendants, and he said that he would consider the matter and let me know.

Meanwhile, as the Court is aware, we have been considering various plans for making maximum use of the rights and franchises of REA to engage in the express business. One proposal involves REA's former employees who had organized themselves in a company called REAMCO. One of the decisions which I will be obliged to make in due course is which of these various proposals to recommend to the Court. On April 20th, I was informed that Messrs. Wisehart, Friou & Koch had become counsel to REAMCO and were undertaking to assist it in having its proposal finally selected by the Court. Wisehart, Friou & Koch in addition have also asserted a claim as a preferred creditor against the bankrupt estate and have sought to attach various assets of the bankrupt estate.

During this period, my responsibilities as Trustee have been such that I have been obliged to devote virtually all of my time to the affairs of REA. It will be necessary to develop and pass upon various proposals which have been made respecting the business of REA. Considerable work remains in evaluating claims against the bankrupt estate and fixing them as to precise amount and determining what priorities or subordinations might be appropriate. Additional plans might well be developed. REA is engaged in a number of complex litigations. As best I can judge, my duties as Trustee will require most of my time for an indefinite period in the future. Therefore, I have been increasingly considering whether I should withdraw from Shearson Hayden Stone or perhaps obtain an extended leave of absence. I have mentioned this from time to time to Messrs. Wisehart and Friou, but not, I insist, in connection with this matter of my capacity to act as Trustee.

On May 6, 1976, Mr. Friou delivered to me the document which I attach to this letter and mark Exhibit A. At the time, he stated that his firm had found serious problems and that he believed I should get an outside opinion. It will be seen from this document that Mr. Friou under the letterhead of his firm expresses the opinion that I should resign as Trustee of REA. He bases this upon certain factual misunderstandings, the first being that I believed that I had a conflict. This is not so. I had asked, based upon a disclosure of the facts whether I had a conflict in respect of passing upon the railroad litigations and that I sought his opinion as being the originator of such litigations merely to confirm my own belief and that expressed by him and other counsel in the presence of the Court on March 6th. Mr. Friou further states in his written opinion that I had been selected by the railroad creditors. As I have pointed out, at the time of my selection I did not know any of the creditors and my selection was based entirely upon my knowledge of counsel to certain of the airlines who was familiar with particular experience and expertise which I have and which relates to the basic problems of the bankrupt estate. There is an inference that I have considered resignation from Shearson Hayden Stone for the purpose of eliminating any conflict. That has not been my purpose at all as I have noted.

Late in the afternoon of May 11th, I received from Mr. Friou a further memorandum of that date, a copy of which is attached to this letter as Exhibit B. It will be seen that this memorandum again does not address itself to the question which I had asked which was whether I had a conflict respecting the railroad litigations by virtue of compensation to Shearson Hayden Stone from certain of the railroad defendants for consulting services. The memorandum is directed at alleged railroad/airline domination of the Chapter XI proceedings including the selection of the Creditors Committee and counsel as raised in

chambers on March 9th, but this time the theory is expanded to include me as having had a serious ab initio conflict. As noted already, I did not in fact participate in any way in the Chapter XI proceedings and I had no particular relationship to the railroad creditors but was chosen because of my professional background and the absence of any special connection with any particular group of creditors. I only add that I know of no action which I have taken as Trustee which could in any way be construed as favorable to the railroads or airlines or as adverse to the employees. I have actively solicited proposals for the revival of the express business and have encouraged such proposals including that by the employees now represented by Wisehart, Friou & Koch.

When I received Mr. Friou's first memorandum on May 6th and, considering all of the circumstances, it seemed appropriate that I obtain the opinion of counsel who had no relationship at all to this matter or to any of the parties. I gave this some thought and discussed it with various acquaintances at the Bar. One recommendation was Paul Windels of the firm of Windels & Marx. I had met him in connection with a financing several years ago and had been aware of him by reputation over the years. He seemed to be, based upon his background and standing, a good person to advise me in respect of this matter. Accordingly, I discussed it with him preliminarily on May 7th and had several meetings with him during the following week in which we reviewed the overall facts and various documents including Mr. Friou's memorandum of May 11th which I thought might pertain to an evaluation of my position.

I bring these matters to the Court because understanding the great complexity and importance of my responsibilities, I would not want to continue in a position of trust unless I had the continuing confidence of the Court.

In view of the circumstances, I would like to obtain a formal opinion from the firm of Windels & Marx with respect to the conclusions contained in Mr. Friou's memoranda of May 6th and May 11th. I therefore respectfully request that the Court authorize me to request my general counsel Whitman & Ransom and Marcus & Angel to prepare an application and order authorizing me to retain the firm of Windels & Marx for the purposes set forth above.

Respectfully yours,

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DERMOTT NOONAN, C.P.A.
200 East 42nd Street
Suite 2300
New York, New York 10017

September 27, 1976

Robert L. Wright, Esq.
1750 New York Avenue, N.W.
Suite 210 United Nations Building
Washington, D. C. 20006

Dear Mr. Wright:

In reference to my report of this date on my examination of the "Proof of Claim" files of REA Express, Inc. Bankruptcy No. 75-B-253 and related cases, in the Bankruptcy Court, U. S. Courthouse Room 230, Foley Square, New York, N. Y., you have asked me to elaborate on the problems encountered in my search of the files made for the purpose of locating, identifying and tabulating Proofs of Claims filed by Claimants, principally railroad companies, with particular emphasis on claims for principal and interest on promissory notes of Railway Express Agency, Inc., dated October 1, 1959. In this engagement, I was ably assisted by Miss Cheryl Stelter, formerly of REA Express, Inc., who was familiar with these files, having worked on them for some months in the spring and summer of 1976.

Proofs of Claims received by the Court are filed in manila or red pleated folders chronologically, and

dated to correspond with the filed date stamped on the claim by the clerks who open the mail each day. The files are segregated into three sections, one section for REA Holding Corporation, another for REA Express, Inc., and a third for Rexco Supply Corp., as follows:

	Filed claims
REA Holding Corporation	11,066
REA Express, Inc.	18,256
Rexco Supply Corp.	11
Total claims in files received 6/8/76 and prior	29,333
Plus claims stamped filed after 6/8/76	342
Total claims in files per physical count	29,675

Of the above claims in the Bankruptcy Court files, the following tabulation shows:

Claims listed by EPI (Electronic Processing Incorporated, Kansas City, Kansas) on a 434-page computer run on file in the Court entitled "REA Express-Notice of Hearings on Proposed Sale and Applications for Allowances Notices Mailed 8/24/76 in case 750253"	25,141
EPI Index sheets of claims filed 3/23/76 to 6/8/76 prepared but not sent to EPI for inclusion in computer files	4,173
Total claims filed dated 6/8/76 and prior	29,314

	29,314
Claims in files stamped filed 6/10/76 to 7/8/76 marked late, not sent to EPI	342
Total claims in files per above	29,656
Difference from physical count	19
Total claims in files per physical count	29,675

On making inquiry as to which claims are filed as REA Holding Corporation v. REA Express, Inc. or Rexco Supply Corp., I was informed that this segregation depended strictly on the way the claim was addressed to the Court. On further inquiry to Mr. Arthur Wisehart as to what claims were appropriate for REA Holding Corporation, I was informed that practically 100% of all claims are against REA Express, Inc., since REA Holding Corporation had a management contract with REA Express and consisted of perhaps 10 or 15 employees with essentially no outside creditors other than REA Express, Inc.

On further inquiry as to why so many REA Express, Inc. creditors filed claims against REA Holding Corporation, which they never knew existed, I was informed that the printed forms sent to all creditors were headed up "In re: REA Holding Corporation Bankruptcy No. 75-B-0251," so that over 11,000 REA Express, Inc. creditors filed claims "In re: REA Holding Corp." Other creditors who used this Proof of Claim form crossed out REA Holding Corp. and typed in REA

Express, Inc. or used a blank form addressed to the Court "In the Matter of REA Express, Inc.," frequently adding f/k/a Railway Express Agency, Inc. It would appear that a misdirection to the claimant on the printed Proof of Claim form mailed to him by EPI, the computer processing and mailing service, has led to massive confusion in filing claims by the Court, further obscuring the location of a claimant's claim in the files.

Because of this confusion, Rexco Supply Corp. claims are filed at random in the REA Holding Corporation files and in the REA Express, Inc. files, and vice versa.

Of the 29,000 plus claims on file, fully 80% or 23,000 consist of Proof of Claims for (1) Wages, Salary, or Commissions (including Pensions) and (2) Loss and Damage claims. Of these, perhaps 10,000 represent employee claims and 13,000 represent customer loss and damage claims, many going back for years. These claims are all interspersed in the files, both Holding Corporation and REA Express files, at apparent random in filing date sequences. A simple segregation of these claims at inception with these two categories, would have significantly simplified the filing and would have materially assisted in locating claimants' files.

It is to be noted that the claims received are not identified either numerically or alphabetically in the files, the only sequence being chronologically by filing date, without index or cross reference.

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In an endeavor to assist in the preparation of creditors' lists, and in assisting in preparing, addressing and mailing notices to creditors, the Electronic Processing Incorporated of Kansas City, Kansas, was engaged as a computer service bureau. The first mailing by EPI, as this service bureau is referred to, was on or about December 9, 1975 and according to their invoice consisted of 44,620 notices. The source data for this mailing was furnished by REA Express, Inc. from their creditor records. Subsequent mailings were made on or about the following dates as stated on their invoices for such services:

Date of Invoice	No. of Notices Mailed
December 30, 1975	9,517
February 26, 1976	9,517
April 29, 1976	26,651
May 27, 1976	31,727
June 15, 1976	25,132
August 26, 1976	25,141

There are in file in the Bankruptcy Court, Room 230, computer print-out runs of creditors' claims listed in the EPI computer files as follows:

Date of Computer Run	Pages in Run	No. of Claims Listed
April 1, 1976	574 pages @ 22 items	12,628
May 7, 1976	*864 pages	22,854
August 24, 1976	434 pages @ 58 items	25,141
	*641 pages @ 28 items	
	233 pages @ 22 items	
	864 pages per above	

Proofs of Claims received by the Court and stamped FILED with file dates of March 27, 1975 through March 22, 1976 were listed by Miss Cheryl Stelter, on "Index of Claims Filed" forms provided by EPI showing the claimant's name, amount claimed, date filed and claimant's attorney, agent, or assignee where so noted on claim. These index sheets were typed in duplicate by Miss Stelter, the original being sent to EPI by the Court administrative staff. In all, Index Sheets with a total by our count, of some 25,160 claims were prepared by Miss Stelter and sent to EPI. The August 24, 1976 EPI computer run listing 25,141 claims confirms this physical check with which we concur.

Unfortunately, the yellow carbon copies of these Index Sheets could not be located in the Court files, so we were not able to avail ourselves of this valuable reference source.

Proofs of Claims received by the Court and file dated March 23, 1976 through June 8, 1976 were also listed on "Index of Claims Filed" forms in duplicate by Miss Stelter. However, the original and yellow duplicate copies of these Proofs of Claims for a total of 4,173 claims are presently on hand in the Court files and were <u>not</u> sent to EPI by the Court staff. Thus they were never key punched by EPI and are <u>not</u> included in the EPI computer Proof of Claims files. Therefore they are not included on any EPI creditors' lists used to mail notices to creditors.

On inquiry as to the reason for the failure to send these Index Sheets covering 4,173 Proofs of Claims filed by the Court prior to June 8, 1976, Miss Stelter was informed by the Court staff that they were advised by the Trustee not to send any more Proofs of Claims received after March 25, 1976 to EPI in order to curtail expenses.

In addition to the Proofs of Claims referred to above, there are 342 claims file dated June 10, 1976 to July 8, 1976 which were not listed on "Index of Claims Filed" forms and were not sent to EPI. Most of these claims represent Proofs of Claims for Wages, Salary or Commissions. The folders containing these claims are marked as late filings.

These are the computer runs of Proofs of Claims prepared by EPI on file in the Court files. As previously noted, each of these runs lists the claims in numerical sequence in the order in which the claims were listed on the individual "Index of Claims Filed" forms (providing 25 items per page). For the April 1, 1976 run, there is also on file an alphabetical computer run of the claims. However, alphabetical listings are not in the Court files for the listings of May 7, 1976 and August 24, 1976. Without the alphabetical listing, it is an almost hopeless task to locate an individual claimant's file through the means of the numerical listing only.

A reference to the alphabetical listing of April 1, 1976 shows the claims listed in alphabetical order by first names and initial only, thus in reference to the some 10,000 employee claims, the listing for Richard T. Sugarman will read Richard T under alphabetical sequence R. John R. Jones will be listed under alphabetical sequence J, etc. Even where the first name is known, it is necessary to know the middle initial to differentiate the numerous listings under John. Where only the last name is known, the alpha listing is completely useless.

In the case of corporations, if the name begins with "The" such as "The Atchison, Topeka and Santa Fe Railway Company" the listing will be under alpha sequence T.

This alpha listing is in complete variance with the Company's own creditors' lists which are in the normal alphabetical sequence of last name first.

In spite of this, the alpha listing is only useful, where useful at all, in order to identify the filing date of the claimant's file. With that known, it is necessary to research all the claims filed on that date (there may be hundreds filed on any given date), in order to locate the particular claimant's file sought.

In summary, the computer runs in the Court Clerk's office are essentially useless as an aid in locating specific claimants' files.

We therefore had to resort to the tedious and time consuming task of culling through all 29,000 plus Proofs of Claims in the Bankruptcy Court files to locate the claims from the railroads which were the subject of our engagement.

Very truly yours,

Dermott Noonan

cc: Arthur M. Wisehart, Esq.

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DERMOTT NOONAN, C.P.A.
200 East 42nd Street
Suite 2300
New York, New York 10017

September 27, 1976

Robert L. Wright, Esq.
1750 New York Avenue, N.W.
Suite 210 United Nations Building
Washington, D. C. 20006

Dear Mr. Wright:

In accordance with your instructions, I have made an examination of the "Proof of Claim" files of REA Express, Inc., F-K-A Railway Express Agency, Inc., Bankruptcy No. 75-B-253, REA Holding Corporation, Bankruptcy No. 75-B-251, Rexco Supply Corp., Bankruptcy No. 75-B-254 and The Express Co., Inc., Bankruptcy No. 75-B-252, all in the United States District Court, Southern District of New York, Bankruptcy Court, U. S. Courthouse Room 230, Foley Square, New York, N. Y. This examination was made with the assistance of Miss Cheryl Stelter, formerly of REA Express, Inc., for the purpose of locating, identifying and tabulating Proofs of Claims filed by claimants, principally railroad companies, but in a few instances by assignees, with particular emphasis on claims for principal and interest on promissory notes of Railway Express Agency, Inc. dated October 1, 1959.

In all, we located forty-two claims (as amended in certain cases) from claimants representing some fifty-five railroads for a total of some $40,702,000, of which $26,360,000 represents promissory notes principal, $5,609,000 represents interest accrued thereon, and $8,733,000 represents claims for other charges including transportation, maintenance, rent and the like. These claims are detailed on the attached schedule, which lists all of the note holding railroads listed on pages 223 and 224 of the Report of the Interstate Commerce Commission, Finance Docket No. 20812, Railway Express Agency, Inc. Notes, served August 29, 1975. Of the some fifty-two railroads listed in the ICC report, claims for twelve of the railroads listed were not found in the files and therefore no claim amounts are shown for these on the attached schedule. Photo copies of the Proof of Claims listed on the attached schedule are also enclosed for your convenience.

Copies of the Promissory Notes attached to the claims state in sub-paragraph 1 that "This note constitutes one of 66 similar notes in the aggregate principal amount of $27,637,053.80 ...." Since the aggregate principal amount shown on the attached schedule is $26,360,041, it would appear that additional notes aggregating $1,277,013 are extent and should be represented by claims which we were not able to locate in our search of the claims files.

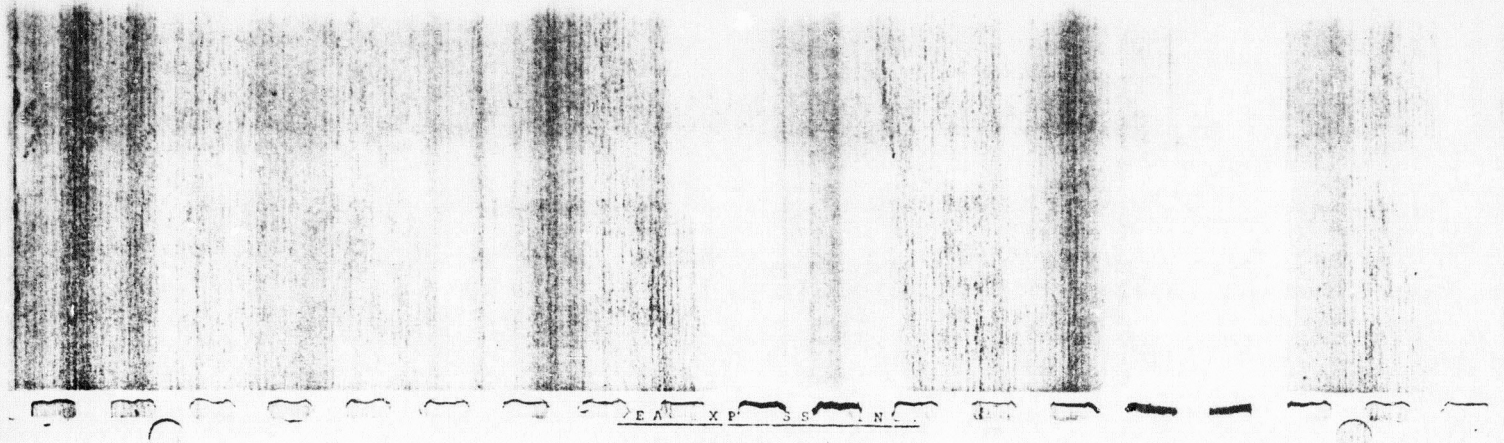
In this regard, it should be noted that the method of maintaining the files posed formidable barriers to the orderly and effective search for these claims which is the subject of a separate letter report on this subject.

Very truly yours,

Dermott Noonan

Encl.

cc: Arthur M. Wisehart, Esq.



BANKRUPTCY No. 75-13-253

PROOFS OF CLAIMS FILED BY RAILROAD COMPANIES AND ASSIGNEES ON CLAIMS FOR PRINCIPAL AND INTEREST ON PROMISSORY NOTES OF RAILWAY EXPRESS AGENCY, INC. DATED OCTOBER 1, 1959

Date of Claim	Date Filed	Claimant	Total Claim	Promissory Note		Transportation Charges, Maintenance, Rent, etc.
				Principal	Interest	
		The Alabama Great Southern Railroad Company	$	$	$	$
6/7/76	6/8/76	The Atchison, Topeka and Santa Fe Railway Company	1,960,372	1,330,115	339,292	290,965
6/1/76	6/7/76	The Baltimore & Ohio Railroad Company	1,429,035	1,185,537	243,498	-
4/7/75		Bangor & Aroos Tock Railroad Company	28,916	28,916	-	-
10/24/75		Boston & Maine Railroad	794,190	665,058	129,127	5
4/3/75	4/8/75	Burlington Northern, Inc.	448,972	-	-	448,972
5/28/76	6/3/76	Burlington Northern, Inc.	2,313,208)			
		Northern Pacific	)	346,986)		
		Great Northern	)	433,733)	309,078	413,782
		Chicago Burlington Quincy	)	780,719)		
		Spokane Portland & Seattle	)	28,910)		
		Canadian National Railway Co.				
		Central of Georgia Railway Company				
		Central Railroad Co. of New Jersey (United States of America - Assignee)				
6/1/76	6/7/76	The Chesapeake & Ohio Railway Company	592,527	491,565	100,962	-
5/20/76		Chicago & Eastern Illinois Railway Co.	178,102	144,577	33,273	252
	6/7/76	Chicago Milwaukee St. Paul & Pacific RR Co.	1,029,247	751,804	194,246	83,196
5/19/76	5/21/76	Chicago & Northwestern Railway Co.	243,535)			
		Chicago Great Western RR	)	115,662)	43,374	26,668
		Minneapolis & St. Louis RR	)	57,831)		
4/4/75	4/8/75	Chicago Rock Island RR	850,707	-	-	850,707
11/17/75) 4/4/75)		Chicago Rock Island and Pacific RR Co.	1,538,415	1,000,000 Est.	200,000 Est.	338,415
		The Cincinnati New Orleans & Texas Pacific RR Co.				
4/6/76	4/9/76	The Cleveland, Cincinnati, Chicago & St. Louis RR	533,343	433,733	99,610	-
5/28/76		Clinchfield Railroad Company	34,699	28,916	5,783	-
6/1/76	6/3/76	The Colorado & Southern Railway Co.	103,713	86,747	16,879	87
6/18/75	6/20/75	Erie Railroad Co.	665,058	665,058	-	-
6/18/75	6/20/75	Delaware Lackawanna and Western RR (Pennsylvania Coal Co. Assignee)	404,817	404,817	-	-
		The Delaware & Hudson Railroad Co.				
	7/7/75	The Denver & Rio Grande Western RR Co.	173,492	173,492	-	-
6/18/75	6/20/75	Erie Lackawanna Railway Co.	31,106	28,916	-	2,190
		Florida East Coast Railway Co.				

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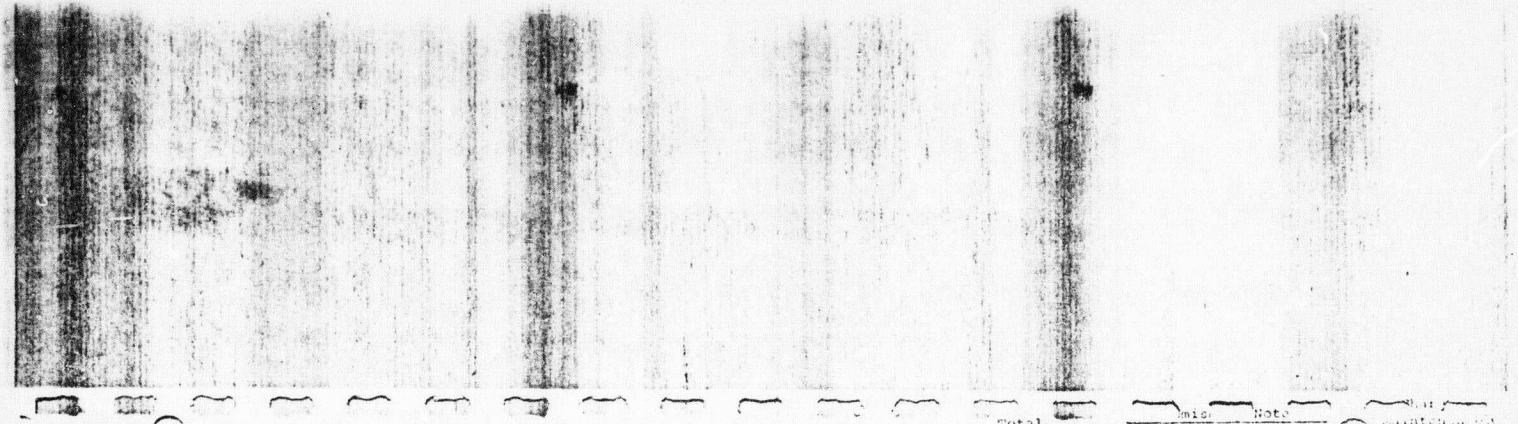

Date of Claim	Date Filed	Claimant	Total Claim	Principal	Interest	Penalty
6/16/75		Gulf Mobile & Ohio RR Co.	$)	$ 173,493	$ 34,867	$
6/16/75		Illinois Central RR Co.	1,250,875)	838,551	168,525	35,439
	5/2/75	The Kansas City Southern RR Co.	103,590	86,747	16,843	-
	6/3/76	Fort Worth & Denver RR Co.	17,271	14,458	2,813	-
		Lake Superior & Ishpeming RR Co.				
		Lehigh Valley RR Co.				
5/26/76		Louisville & Nashville RR Co.	897,790)		)	74,741
		L&N	)	566,755	147,041)	
		Monon	)	86,747	22,506)	
4/14/75	4/16/75	Maine Central RR Co. (Assignee Montefiore Hospital and Medical Center	72,000	60,000	12,000	
3/30/76	4/8/76	The Michigan Central RR Co.	1,102,242	896,382	205,860	-
6/6/75		Minneapolis, St. Paul Sault Ste Marie RR	)	86,747)		-
		Wisconsin Central RR	241,719)	86,747)	39,309	-
		The Duluth, Southshore and Atlantic RR	)	28,916)		
3/31/76		Missouri-Kansas-Texas Railroad Co.	429,395	346,986	82,409	-
5/21/76		Missouri Pacific RR Co.	718,557	578,311	133,096	7,150
5/19/76		Norfolk and Western RR Co.	1,125,366	751,804	194,954	178,608
		New York Susquehanna Western RR (Bankers Trust Co. Assignee)				
4/7/75	4/8/75	Penn Central Transportation Co.	509,439	-	-	509,439
6/1/76)	6/4/76)		12,053,838)			2,869,761
5/21/76)	5/26/76)	Trustees of Property of:	624,962)	3,643,559		348,665
		Pennsylvania Central RR	)		706,994)	20,681
			)		129,919)	
			)		538,662)	
		New York Central RR	)	2,775,892	99,747)	
			)		240,886)	
		New York, New Haven & Hartford RR	)	1,272,284	46,630)	
	5/12/75	Reading Co.	394,807	364,986	47,711	(17,890)
9/23/75		Richmond, Fredericksburg & Potomac RR Co.	248,295	202,409	43,434	2,452
2/18/76		St. Louis-San Francisco RR Co.	623,555	404,817	78,494) 20,241)	120,033
6/4/76	6/7/76	St. Louis Southwestern RR Co.	276,446	57,835	13,305	205,306
8/29/76		St. Louis Southwestern RR Co. of Texas				
5/28/76		Seaboard Coast Line Railroad Co.	1,962,544	1,069,875	246,328	646,341
		Soo Line RR Co.				
6/2/76	6/7/76	Southern Pacific Transportation Co.	2,057,821	1,199,699	275,701	583,421
10/1/75		Southern RR Co.	802,813	572,104	111,179	119,530
		Spokane, Portland & Seattle RR Co.				
5/21/76		The Texas and Pacific RR Co.	287,928	231,324	53,237	3,367
5/23/76		Union Pacific RR Co.	1,479,245	722,889	166,264	590,092
4/15/76		The Western RR of Alabama	34,121	28,916	5,205	-
6/1/76	6/7/76	Western Maryland RR Co.	34,855	28,916	5,939	-
			$40,702,928	$26,360,041	$ 5,609,291	$ 8,733,669

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re	:	Bankruptcy Nos.
REA HOLDING CORPORATION	:	75 B 251
THE EXPRESS COMPANY		75 B 252
REA EXPRESS, INC., f/k/a	:	75 B 253
Railway Express Agency, Inc.		75 B 254
REXCO SUPPLY CORPORATION,	:	
Bankrupts.	:	

- x

REPORT OF THE BANKRUPTCY COURT ON A PETITION FOR REORGANIZATION UNDER CHAPTER X OF THE BANKRUPTCY ACT FILED AGAINST THE ABOVE-NAMED BANKRUPTS.

A petition for reorganization of a corporation under Chapter X of the Bankruptcy Act (11 U.S.C. Chapter 10, Sees. 501-676) verified June 23, 1976 was filed against the above-named bankrupts by 10 unsecured creditors (the "Chapter X petition"). The matter was assigned for all purposes to Hon. Lloyd F. Mac Mahon, District Judge. On September 27, 1976 the District Judge remanded the matter to me under §117 of the Bankruptcy Act (11 U.S.C. §517), Rules of Bankruptcy Procedure 10-103 to hear and report on whether the Chapter X petition was filed in good faith.

A hearing was held by me on Monday, September 27, 1976 at 2:15 P.M. The petitioning creditors were represented by Wisehart Friou & Koch by Arthur Wisehart, Esq. and Robert Friou, Esq. of counsel. The Trustee was represented by Whitman & Ransom, and Marcus & Angel, William M. Kahn, Esq., Joshua J. Angel, Esq., and Donald L. Wallace, Esq., of counsel. The Debtor was represented by Anderson, Russell, Kill & Olick, Arthur Olick, Esq., of counsel. In making the findings of fact and conclusions of law set forth below, I considered all of the evidence presented to me, all statements of counsel, the transcript of a hearing before me in the above matter on November 5, 1975, November 6, 1975, the order to show cause dated May 24, 1976, bringing on for hearing an offer by Alltrans - U.S.A. (Alltrans) to purchase certain operating authorities of the bankrupt, the transcript of the hearings held on such order to show cause on June 23, 24, 25 and 30 and on July 1, 8 and 9, 1976, all exhibits submitted on that hearing, all briefs filed on that hearing, the Trustee's Brief submitted to Judge Mac Mahon, the Petitioner's Pre-Hearing brief filed by Petitioner's counsel prior to the hearing before me on September 27, 1976, my order and opinion of July 16, 1976, all of the information, testimony, financial data and all papers filed in this proceeding from February 18, 1975 to the present date, as well as my own impression of all witnesses and counsel

who have appeared before me in this proceeding from February 18, 1975 to the date of this report.

At such hearing of September 27, 1976, I ruled that there is no issue presently before this Court with respect to whether or not any conflict of interest exists on behalf of the Trustee or his counsel for the reason that no written motion to remove the Trustee has ever been filed with this or any other court nor has any notice of such a motion ever been sent to creditors, nor has any hearing date ever been set for such a written motion as required by Section 2a(17) of the Bankruptcy Act (11 U.S.C. §11) . I therefore excluded from my consideration and I exclude from this record all references and documents which attempt to raise or make any references or inferences with respect to any issues of conflict of interest by the Trustee and in particular I exclude items 4, 5, 6, 7, 9, and so much of item 8 as discusses any such conflict from the list of documents in the appendix to the petitioner's pre-hearing memorandum.

Therefore, the Court, being fully advised in the premises, makes the following findings of fact, conclusions of law and recommendation.

FINDINGS OF FACT

1) That the above-named bankrupts filed a petition for an arrangement under Chapter XI of the Bankruptcy Act on February 18, 1975.

2) That the debtor in possession operated its business from February 8, 1975 through November 6, 1975 inclusive.

3) That from February 18, 1975 through November 6, 1975, the debtor lost approximately $19,000,000 inclusive of any Chapter XI claims by employees and in excess of $12,000,000 exclusive of any Chapter XI claims by employees.

4) That on November 6, 1975, the debtor requested that it be adjudicated a bankrupt because it was unable to meet its current payrolls.

5) That from February 18, 1975 through November 6, 1975 the debtor promised its suppliers of goods and services that it would pay 40% of current operating expenses exclusive of payroll, that the debtor was unable even to pay such 40%.

6) That the debtor was adjudicated a bankrupt by order of this Court on November 6, 1975.

7) That on November 7, 1975 C. Orvis Sowerwine duly qualified as Trustee by filing his bond, which bond was approved by order of this Court dated November 7, 1975. That such Trustee has continued as such Trustee until the date of this report.

8) That on May 24, 1976 this Court signed an order bringing on for hearing on June 23, 1976 an offer by Alltrans to purchase all of the operating authorities of the bankrupt.

9) That notice of such hearing was given to all persons who had filed claims, which claims were docketed with

the Clerk of this Court and further notice of such hearing was published in the New York Times, Wall Street Journal and Traffic World.

10) That the notice referred to in finding 9 was sufficient and if some creditors had not received such notice, any such defect was cured by publication in the New York Times, Wall Street Journal, and Traffic World and by the order confirming the sale.

11) That the petitioning creditors and their counsel had notice of such hearing and appeared at such hearing and no other person has raised any issue with respect to the adequacy of such notice.

12) That during the Alltrans hearing, counsel for REAEMCO, Inc. (REAEMCO), an unsuccessful bidder at the sale offered the within petition for reorganization under Chapter X of the Bankruptcy Act for identification as Exhibit 25 of REAEMCO and such exhibit was physically handed to the Bankruptcy Judge.

13) Neither REAEMCO, the petitioning creditors, nor their counsel ever paid any filing fee to the Clerk of this Court until September 7, 1976 at the earliest.

14) No original petition or copies of the original petition were delivered to the Clerk of the Court before September 7, 1976.

15) The Clerk of this Court has never issued any summons.

16) The Clerk of this Court never accepted any petition for reorganization under Chapter X of the Bankruptcy Act for any of the above-named bankrupts, nor accepted any filing fee prior to September 22, 1976.

17) On July 16, 1976 this Court handed down an opinion, findings of fact and order authorizing the Trustee to sell the operating authorities of the bankrupt to Alltrans.

18) By order dated July 27, 1976, this Court (Hon. Roy Babbitt, Bankruptcy Judge) approved a contract between the Trustee and Alltrans for the sale of the operating authorities.

19) That only REAEMCO appealed the decision of this court dated July 16, 1976 to the United States District Court. No appeal from the order of Judge Babbitt dated July 27, 1976 has been taken by anyone.

20) REAEMCO's appeal from the order of this Court dated July 16, 1976 was argued before the United States District Court (Hon. Henry Werker, D.J.) on August 28, 1976.

21) That after the argument of such appeal but prior to Judge Werker reaching any decision and on or about September 15, 1976 Judge Werker wrote a memorandum to the Clerk of this Court returning the appeal on the ground of the apparent filing by petitioners of a petition for reorganization under Chapter

X of the Bankruptcy Act resulting in an automatic stay of all proceedings.

22) That the clerk of this Court referred such petition to the Hon. Lloyd F. Mac MahonDistrict Judge who remanded such petition to me on September 27, 1976 to hear and report on the issues of good faith in accordance with Section 117 of the Bankruptcy Act, Rule 10-103 (2) of the Rules of Bankruptcy Procedure, and the Local Rule X-7.

23) That by June 23, 1976 the Trustee had sold all of the operating assets of the bankrupt except for the operating authorities and certain small isolated parcels of real estate. That all personalty whether located in such isolated parcels or not, have been completely sold.

24) That all operating personnel of the bankrupt have been discharged with the exception of certain employees of the REXCO division.

25) That the bankrupt has virtually no physical or tangible assets remaining other than cash, that there is no business left to be reorganized since the bankrupt no longer possesses the resources to be a going concern.

26) That the sole remaining assets in the bankrupt estate consist of between $6 and $7million in cash, isolated small parcels of real estate and claims.

27) That all of the petitioning creditors are persons

who would be entitled to a beneficial ownership interest in REAEMCO, if REAEMCO had been the successful bidder for the operating authorities.

28) That counsel to the petitioners is [illegible] counsel to REAEMCO and such counsel agreed that the Chapter X petition should not be considered if REAEMCO was the successful bidder at the sale of the operating authorities.

29) That such Chapter X petition was filed with the purpose of collaterally attacking the order of this Court dated July 16, 1976 by beneficial owners of REAEMCO, an unsuccessful bidder at the sale of the operating rights.

30) That the liquidation being conducted by this Trustee is the best method of preserving the remaining values for those entitled to share in such values.

31) It is unreasonable to expect that a plan of reorganization can be effected as a result of the filing of the Chapter X petition.

32) That the issue of conflict of interest sought to be raised by the petitioners against the Trustee and his counsel has not properly been raised before this Court, or any other court and is therefore not before this Court.

33) That without deciding whether the application for the appointment of a receiver should be granted if the Chapter X petition is approved, that unless a Chapter X peti-

tion is granted, there is no need for the appointment of a receiver.

34) That the debtor has generally appeared in this proceeding by its attorneys, and is opposed to the granting of the Chapter X petition for the reason inter alia that it believes that it is impossible that any plan of reorganization can be effected.

35) That since only one filing fee was paid to the Clerk of the Court, the present Chapter X proceeding may only apply to one bankrupt.

36) That such Chapter X petition has been filed only against the bankrupt REA Express, Inc.

CONCLUSIONS OF LAW

1) That the Chapter X petition was filed on September 22, 1976.

2) This Court is satisfied that the petition complies with the formal requirements of Chapter X and that this Court has jurisdiction to hear such petition.

3) That such Chapter X petition was not filed in good faith because it is unreasonable to expect that a plan of reorganization can be effected.

4) That the Chapter X petition was not filed in good faith because a prior proceeding is pending in this Court and it appears that the interests of creditors would be best subserved in such prior proceeding.

5) That such Chapter X petition was not filed in good faith under general equity principles.

~~6) That under the provisions of Rule 10-113 of the Rules of Bankruptcy Procedure, the bankrupt estate is entitled to recover costs and reasonable counsel fees from the petitioners after a hearing on reasonable notice to such petitioners.~~

RECOMMENDATION

I recommend that the Chapter X petition be dismissed because it was not filed in good faith, ~~and that the bankrupt estate be awarded costs and reasonable counsel fees to be assessed at a hearing to be held before me on reasonable notice.~~

I further recommend that petitioners' application for the appointment of a receiver be in all respects denied.

IT IS ORDERED, that this Report shall be submitted to United States District Judge Lloyd F. Mac Mahon for hearing and approval at 2:15 o'clock on September 30, 1976 in Room 706, United States District Court House, Foley Square, New York City.

Dated:

September 28, 1976

/s/ J. Goldow

Bankruptcy Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of	:	Bankruptcy Numbers
REA HOLDING CORPORATION	:	75-B-0251
THE EXPRESS COMPANY, INC.		75-B-0252
REA EXPRESS, INC., f/k/a	:	
Railway Express Agency, Inc.		75-B-0253
NEXCO SUPPLY CORPORATION,	:	75-B-0254
Bankrupts.	:	

OPPOSITION OF PETITIONING CREDITORS
TO TRUSTEE'S PROPOSED FINDINGS OF
FACT AND CONCLUSIONS OF LAW

COMES NOW Wisehart, Friou & Koch on behalf of petitioning creditors herein and submits this opposition to the proposed findings of fact and conclusions of law submitted on behalf of the Trustee herein dated September 28, 1976 and received at 5:30 p.m. this date.

1. The Trustee and his counsel, who are adversaries in the proceeding, and who seek to perpetuate their positions, should not have been asked to submit proposed findings and conclusions. This is a function of the Court itself under F. R. Civ. P. 52, and the request for proposed findings improperly makes the Court an ally of an adversary. In this case the adversary is not only an adversary but one which has been charged with a substantial conflict of interest, as well as an interest in perpetuating a position. This proceeding was remanded by Judge MacMahon to the Bankruptcy Court for the purpose of making its own findings, not for the purpose of permitting the Trustee and his counsel to attempt to correct the many deficiencies in the record previously made which was

appealed to Judge Werker. It should be noted that the Trustee and his counsel did not offer any testimony at the hearing on September 27, 1976 which Judge MacMahon requested. Therefore the offers of proof made on behalf of the petitioning creditors should be deemed uncontroverted for that purpose. It should be noted as the transcript of the hearing on September 27 will show that many of the so-called proposed findings go far beyond anything that was discussed at the hearing itself. The proposed findings are therefore wholly improper.

2. We have just been informed that in the late afternoon of September 28, 1976 a letter from the firm of Anderson Russell Kill & Olick was delivered to this Court. It is our understanding of the letter that it suggests that special counsel should be appointed to the debtor to reach an independent determination as to the answer which should be filed on behalf of the debtor, which determination would supplant or supersede the purported answer filed on September 27, 1976. It is also our understanding that the letter asks that the firm of Anderson Russell Kill & Olick be permitted to withdraw as counsel to the debtor. In view of this development, we believe that the proposed findings, dealing in large part with assertions concerning the position of the debtor, and factual statements regarding the debtor, are not appropriate, and may not in any event be entered at this time.

3. The undisputed evidence in the record as reflected by the offer of proof made on behalf of petitioners is that notice of the hearing with respect to the Allstate and REALTICO proposals was not given to all persons who had filed claims.

4. The undisputed evidence in the record is that the claims filed in the Bankruptcy Court are in a state of utter chaos and that in excess of 4,000 creditors have not been

notified as to any of the transactions undertaken by the Trustee.

5. The undisputed evidence in the record is that the failure to give notice to in excess of 4,000 creditors as stated above was in part attributable to the Trustee himself and the instructions which he gave, in violation of his fiduciary duties to the creditors.

6. Many of the findings proposed are improper because they seek to alter the record made in the appeal to Judge Werker. This was not the purpose of the remand from Judge MacMahon. If the Chapter X petition is not approved, the appeal to Judge Werker should go forward on the basis of the record submitted to him without the prejudice of the collateral findings which the Trustee and his counsel seek to inject at this time.

7. Many of the proposed findings are simply based upon self-serving statements by counsel for the Trustee. For example, they deal with what was done in the office of the Clerk of this Court. No representative of the Clerk of the Court appeared and there is no basis in the record for these proposed findings.

8. Whether the REMICO appeal was or was not proper is not a subject of the remand by Judge MacMahon for the findings of the Court.

9. Judge MacMahon's remand speaks for itself. The attempt of counsel for the Trustee to insert certain references to the Bankruptcy Act and Rules, is improper.

10. In referring to the so-called sole remaining assets in the bankrupt estate, the Trustee and his counsel totally ignore the value of REA's rights and its major litigation. Again, they have a conflict of interest in these matters and a proposed finding from them on the subject is wholly improper.

11. No evidence has been offered that the liquidation being conducted by this Trustee is the best method of preserving the values of the bankrupt estate. Nor has a determination been made as to those best entitled to those values.

12. The proposed findings and conclusions are further utterly void because they are in flagrant violation of the requirements of the Bankruptcy Act and Rules that the Trustee and his counsel must have meetings of creditors on a frequent basis and ascertain their views as a basis for making recommendations or proposals.

13. No evidence has been offered by the Trustee and his counsel controverting the showing that has been made that a receiver should be appointed even if the Chapter X petition is not approved. The offer of proof showing that the files of the Bankruptcy Court are in a chaotic condition has not been in any way refuted. The adverse interest of the Trustee and his counsel with respect to REA's major litigation and the Chapter X petition is clearly apparent. No contrary evidence has been offered with respect to the affidavit submitted on behalf of petitioners herein.

14. The procedural activities of the Trustee and his counsel in this matter have made this proceeding inordinately expensive for the petitioning creditors and their counsel. The petitioning creditors are employees who are without work, and who are supposedly those to whom the Trustee has a fiduciary duty. Any assessment of counsel fees and costs against the petitioning creditors therefore would be wholly unreasonable and inequitable.

15. This firm has repeatedly stated that the Trustee should resign because of the conflicts of interest of the Trustee and his counsel. We were confident that if a determination on the conflict issue were made, after hearing, as we requested, the Trustee could be relied upon to do the right thing. This belief was based inter alia on the representations by the Trustee to this Court that he would not continue to serve if he did not have its continuing confidence, our knowledge of the Trustee, and repeated statements by the Court that it had the conflict problem under consideration. We have now learned, however, that the Trustee's counsel are taking the technical (and incorrect, in our view, considering the circumstances) position that the matter can and will be considered only on a motion to remove the Trustee. Further, at the hearing on September 27, 1976, we orally moved that the Trustee and his counsel be disqualified from opposing the approval of the Chapter X petition on grounds of conflict of interest and a specific adverse interest in that they have a financial interest in being perpetuated in office, which would be foreclosed by approval of the Chapter X petition and the appointment of an independent trustee by the District Court. Again, a technical objection was raised. So that there can be no confusion whatsoever, on behalf of petitioning creditors, said motion is hereby confirmed in writing, although we continue to maintain that it is not necessary to do so under the Federal Rules of Civil Procedure. Further, since it now appears that the Trustee intends to attempt to continue in office whether he has a conflict of interest or not, and because of the extended delay by the Bankruptcy Court in considering this matter, we hereby formally move that the Trustee and his counsel be removed from office, that an independent trustee be appointed by the Court,

entirely apart from whether or not the Chapter X petition is approved for filing, and that Hon. John J. Galgay, Bankruptcy Judge, recuse himself from acting on these motions in view of his personal involvement in the subject matter.

16. Further grounds for disqualification and removal of the Trustee and his counsel are set forth in the affidavit of Robert E. Friou, Esq., annexed hereto, showing that the answer purportedly filed herein by debtor is false and fraudulent in that it lacks proper authority and in fact was not filed on behalf of debtor at all but instead was procured by the Trustee and one of his railroad-affiliated lawyers Donald L. Wallace, Esq., who is also shown thereon as having witnessed the document as Notary Public. Said purported answer was obtained from a former REA employee dependent upon them for continuing employment.

17. Based on the foregoing, and the letter of September 29, 1976, to this Court from Anderson Russell Kill & Olick, and the Code of Professional Responsibility of the American Bar Association, including without limitation Disciplinary Rules 1-101, 5-101, and 5-102, we renew our motion to strike the purported answer on behalf of debtor under F. R. Civ. P. 11 as a sham and false, and Mr. Olick's statement relating thereto as unauthorized, prejudicial, improper because Mr. Olick was not sworn and made available for cross-examination, and misleading, and for the further reason that said statement is unreliable in that it fails to disclose that firm's own substantial responsibility for the injurious consequences of the wildcat strike, which Mr. Olick referred to as having particular importance in the adjudication of REA, because of excessive delay in seeking judicial relief therefrom. Further, based on the foregoing, we repeat our objections to, and move to strike, Mr. Olick's partisan and improper testimony and opinion letter in support

of the Trustee's decision to recommend the Alltrans proposal, the record of which has been made a part of this hearing by the Court, and demand further hearing on the subject.

18. The answer filed herein by the Trustee should be rejected because of (a) the Trustee's disqualification and (b) lack of authority to file under the Bankruptcy Act and Rules. All creditors should be notified at the expense of the bankrupt estate of the pendency of the Chapter X petition herein so that they can exercise their right under the Bankruptcy Act and Rules to submit answers on their own behalf.

19. Finally, no hearing worthy of the name would be adequate which, with F. Ralph Nogg present, one of the country's leading transportation experts, as well as a recognized authority in Chapter X proceedings, relied exclusively upon offers of proof by counsel, rather than the direct testimony of Mr. Nogg himself, a man who has served with great distinction in the Yale Express reorganization under the supervision of Judge Tyler of this Court. The same goes for the eminent accountant, Mr. Dermott Noonan, who was also present, a man who has taught accounting at Yale University and other institutions of higher learning, who has vast experience in transportation and in bankruptcy proceedings, who is a recognized management expert in data processing and proper operation of computer systems and who found based upon his examination that the proofs of claims in the files in the Bankruptcy Court are in a disgraceful and chaotic condition, obviating any meaningful participation by the creditors whatsoever in the affairs of this bankrupt estate, based in part upon the misfeasance of the Trustee. Mr. Noonan also would be able to testify as to Mr. Nogg's standing and reputation in the transportation industry and experience in being a successful bankruptcy trustee. Mr. Nogg has disclaimed any desire to be

the trustee in this case. His testimony was offered as that of an expert, and Mr. Nogg recognizes that the Court would want to appoint, and should have, an independent trustee of its own choice. Mr. Nogg prepared specially for this hearing, had significant recommendations as to action which in Chapter X would improve the administration of the bankrupt estate, and protect REA's rights estimated to be worth $50-100 million, without placing the funds already collected in any jeopardy whatsoever, based upon the profits generated through the continuing REXCO operation. Mr. Nogg's reputation in this area could further be established by inquiry of those in the Securities and Exchange Commission, the Interstate Commerce Commission, and other governmental agencies familiar with his work. Having stayed up all night in various complicated airline routings just in order to be here at the hearing scheduled, the relegation of Mr. Nogg essentially to the status of a non-person, in a matter of this importance, is a gross miscarriage of justice. Over 8,000 employees have been thrown out of work. Their claims aggregate over $50 million. The Bankruptcy Act was designed to afford special protection to wage earners. Instead, in this case, these wage earners have been treated with utter contempt, and no Court seems to be able or willing to allow sufficient time for an adequate presentation of the case on their behalf. The Bankruptcy Court has the attributes of a Court of equity, but it is equity which has been most lacking in its treatment of these former employees who are also creditors.

CONCLUSION

The proposed findings and conclusions should be rejected in their entirety.

Respectfully submitted,

WISEHART, FRIOU & KOCH
Attorneys for Petitioners

By _____
A Member of the Firm
150 East 42nd Street
Fourth Floor
New York, New York 10017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In the Matter of:	:	Bankruptcy Numbers
REA HOLDING CORPORATION	:	75-B-0251
THE EXPRESS COMPANY, INC.		75-B-0252
REA EXPRESS, INC., f/k/a Railway Express Agency, Inc.	:	75-B-0253
REXCO SUPPLY CORPORATION,	:	75-B-0254
Bankrupts.	:	AFFIDAVIT

- -x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ROBERT E. FRIOU, being duly sworn deposes and says:

1. That I am an attorney at law, duly admitted to practice law before this Honorable Corut and I am a member of the firm of Wisehart, Friou & Koch, attorneys for the petitioning creditors herein.

2. That on September 28, 1976, my partner, Arthur M. Wisehart and I inquired of Mr. A. Ernest Larsen, an employee of the Trustee in bankruptcy herein, concerning the purported answer of the debtor to the Chapter X petition filed herein.

3. Mr. Larsen was asked how the purported answer was signed by him. He replied that he had been asked to sign the answer by Mr. Sowerwine, the Trustee and by Mr. Wallace, a member of the firm of Whitman & Ransom, counsel for the Trustee. Mr. Larsen was asked if he had discussed the purported answer with any of the officers, directors or stockholders of the debtor, and Mr. Larsen replied that he had not done so.

4. Annexed hereto is a true copy of a letter received today from Arthur S. Olick of the firm of Anderson Russell Kill

& Olick, P.C. In said letter, Mr. Olick suggests to the Court that special counsel to the debtor be appointed "to reach an independent determination as to what action, if any, the debtor should take with respect to the Chapter X petition," and inter alia to permit his firm to withdraw as counsel to the debtor. Although the letter purports to describe the telephone conversation which Mr. Wisehart and I had with Mr. Olick's firm (but not with Mr. Olick), it is inaccurate in that it omits to say that we specifically stated that we had learned that the answer purportedly filed on behalf of the debtor was false and fraudulent in that it had been unauthorized and improperly instigated, and in violation of the firm's fiduciary obligations to the debtor, and that we specifically requested that it be and Mr. Olick's statements relating thereto, which in certain material respects were misleading, be withdrawn. However, we do appreciate the alacrity of the response and concur in the specific suggestions made.

Robert E. Priour

Robert E. Priour

Sworn to before me this
29th Day of September, 1976

Notary Public

ANTHONY [illegible]
Notary Public, State of New York
No. 31-[illegible]
Qualified in New York County
Commission Expires March 30, 1978

3315

SEP 29 1976

ANDERSON RUSSELL KILL & OLICK, P. C.
ATTORNEYS AND COUNSELLORS AT LAW
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CABLE ADDRESS
"THEWELAZO NEWYORK"

LASZLO ROSENDI
COUNSEL

September 28, 1976

Hon. John J. Galgay
United States Bankruptcy Judge
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, N.Y.10007

Re: REA Express, Inc.

Dear Judge Galgay:

Messrs. Wisehart and Priou called Mr. Anderson this afternoon and suggested that our firm had possibly acted in an improper professional manner in connection with the bankrupts' answer to the Chapter X petition. They also suggested that our actions might have been contrary to the personal relationships between them and members of our firm.

Without conceding the merits of the suggestions made by Messrs. Wisehart and Priou we suggest that it may be important not only that justice be done but that there be the appearance of justice. We further suggest that the interests Messrs. Wisehart and Priou feel may have been ignored should be given an opportunity to be heard. Any inaccuracies in the record should obviously be corrected, if, indeed, there are any requiring correction.

We are anxious to cooperate in any way you may deem appropriate in the premises. We are mindful of the mandate of the Canons that lawyers are not adversaries

but officers of the Court.

In light of the above, we respectfully suggest that Your Honor consider the following actions:

1. Appoint special counsel to the debtor and instruct such special counsel to reach an independent determination as to what action, if any, the debtor should take with respect to the Chapter X petition.

2. Instruct the special counsel to consult with such of the officers, directors, stockholders and creditors of the debtor as may be appropriate.

3. Permit our firm to withdraw as counsel to the debtor.

Very truly yours,

Arthur S. Olick

ASO:bks

cc:
Arthur Wisehart, Esq.,
Wisehart Fricu & Koch
150 East 42nd Street
New York, N.Y.10017

William M. Kahn, Esq.,
Whitman & Ransom
522 Fifth Avenue
New York, N.Y.10036

Joshua Angel, Esq.
Marcus & Angel
60 East 56th Street
New York, New York

Certificate of Service

The foregoing objections were served this day by hand upon Whitman & Ransom, Marcus & Angel, James W. Deer, Esq., and Anderson Russell Kill & Olick, P.C.

Arthur M. Wisehart

Dated: New York, New York
September 29, 1976

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In re

REA HOLDING CORPORATION : 75 B 251
THE EXPRESS COMPANY 75 B 252
REA EXPRESS, INC., a/k/a Railway : 75 B 253
Express Agency, Inc., 75 B 254
REXCO SUPPLY CORP., :

Bankrupts. :

Before:

HON. LLOYD F. MAC MAHON,

District Judge

New York, September 29, 1976
Room 706 - 2:15 p.m.

APPEARANCES

WHITMAN & RANSOM, Esqs.,
Attorneys for Trustee C. Orvis Sewerwine,
WILLIAM M. KAHN, Esq.,
JOSEPH A. GOLDBLUM, ESQ.,
-and-
MARCUS & ANGEL, Esqs.,
By: JOSHUA J. ANGEL, Esq., of Counsel

WISEHART FRIOU & KOCH, Esqs.,
Attorneys for Petitioning Creditors,
ARTHUR M. WISEHART, Esq.,
ROBERT FRIOU, Esq., of Counsel

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APPEARANCES
(Continued)

HOLTZMANN WISE & SHEPARD, Esqs.,
Attorneys for Allen & Company,
JAMES W. DEER, Esq., of Counsel

ANDERSON RUSSELL KILL & OLICK, P.C.,
Attorneys for Debtor,
EUGENE R. ANDERSON, Esq.,
ARTHUR OLICK, Esq., of Counsel

- - -

THE CLERK: In the matter of REA Express.

MR. KAHN: Read for the trustee.

THE COURT: About how long will you require?

MR. KAHN: Your Honor, I would imagine I would require about two or three minutes.

MR. WISEHART: Ready for petitioning creditors.

THE COURT: And how much time?

MR. WISEHART: Your Honor, I would be guided particularly by your Honor's direction in this, but I could easily use half an hour to explain the petitioning creditors' view of the good faith requirements.

THE COURT: If you feel you need a half hour, all right.

MR. DEER: Your Honor, I would like to appear for one of the stockholders, a substantial stockholder of REA. I would not need more than two or three minutes.

THE COURT: All right.

We may have to interrupt along the way here. I have a plea of guilty coming in some time this afternoon. We may have to break for that, but understand that.

MR. WISEHART: Certainly, your Honor.

As a preliminary question, your Honor, my name is Arthur Wisehart and I would like to know whether your Honor has received our memorandum in opposition to the proposed findings which were submitted to Judge Galgay yesterday. We received them --

THE COURT: When was your memorandum filed?

MR. WISEHART: We sent it around this morning, your Honor, with a messenger.

THE COURT: At noon Judge Galgay brought up the file to me. He said he hadn't yet received anything from you, Mr. Wisehart.

MR. WISEHART: I would say the messenger must have left the office about 11:30.

THE COURT: If you have one give it to me so that we won't have any problems about that.

MR. WISEHART: Yes, sir.

THE COURT: ZLet's proceed.

MR. DEER: Could we hand ours up at the same time?

THE COURT: Yes, sure.

MR. DEER: We have served these on the other parties.

MR. WISEHART: Your Honor, may I also inquire if our initial memorandum and appendix is a part of the file herein?

THE COURT: I don't know what you mean by that.

MR. WISEHART: These were papers that were originally --

THE COURT: Whatever was before Judge Galgay is before me.

MR. WISEHART: Thank you, your Honor.

THE COURT: I have the record that was made before him. I referred it to him to hear and determine this.

What is this motion? Suppose I hear that to start with.

MR.WISEHART: There are several motions before your Honor. The principal matter before your Honor

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is the filing of the Chapter X petition. There is also before your Honor an application for the appointment of a receiver.

THE COURT: I referred that matter, Mr. Wisehart, to Judge Galgay to hear and determine.

He has heard and determined. Now what's before me?

MR. WISEHART: Your Honor, I have not seen the specific determination that has been signed by Judge Galgay. If it is in the form of the proposed findings and conclusions by the trustee I think I would be in a better position to answer your Honor's inquiry.

THE COURT: I don't understand why you haven't seen it, Mr. Wisehart. You certainly try people's patience, I certainly must say that.

MR. KAHN: Your Honor, perhaps I can enlighten the Court on the procedure.

Your Honor has remanded the issues --

THE COURT: I referred it to him to hear and determine. Not remand, hear and determine.

Before me at the moment I would suppose there would be a motion to confirm his report or to reject his report.

That's as I see it. I amnot here to hear

anything de novo now.

MR. WISEHART: Your Honor, I believe you have the transcript of the hearing before Judge Galgay.

THE COURT: Yes, I do.

MR. WISEHART: My understanding, your Honor, of what Judge Galgay said in the transcript was that he was going to recommend to your Honor, not determine the issue before him.

THE COURT: The order to Judge Galgay that I signed and is endorsed on the back of your petition states that he is to hear and determine. We will take his report as a hearing and determination. Let's proceed.

MR. WISEHART: All right, your Honor. I will proceed, not having seen Judge Galgay's report.

THE COURT: Here is the report.

MR. WISEHART: Thank you.

THE COURT: I have got nothing to do but wait for you to get around to seeing and hearing things.

MR.WISEHART: I wonder if counsel for the trustee can inform me whether he knows this is in substantially the form submitted on behalf of the trustee.

MR. KAHN: Your Honor, we do not know.

MR. WISEHART: Your Honor, a hasty visual inspection would indicate that there are similarities in the

proposed --

THE COURT: I would imagine there would be.

Let's get to the merits, Mr. Wisehart, if you want me to continue with this hearing.

MR.WISEHART: Yes, sir.

The merits of this case involve the question of whether or not a Chapter X petition was filed in good faith.

The good faith issue before your Honor turns upon the application of the Bankruptcy Act, Section 146 specifically, which provides that if petitioning creditors, whom I represent, all told approximately 8,000 employees who have been thrown out of work and who have claims estimated at approximately $50 million in this proceeding, have a right, upon reasonable belief, to ask that a bankruptcy, even after adjudication, be transferred to a Chapter X case.

The question is what is their reasonable belief that this bankrupt estate, although it was on November 6, 1975 adjudicated a bankrupt, can be successfully reorganized?

To answer that question, your Honor, may I give your Honor some background in this situation.

THE COURT: I wish you would address yourself

to why and what's wrong with what Judge Galgay has found and determined.

MR. WISEHART: What is wrong with what Judge Galgay has found and determined is that Judge Galgay would not listen to one of the leading transportation experts in the United States who was a successful Chapter X trustee of Yale Express under the supervision of Judge Tyler of this court, who flew all night to get here, who disclaimed any interest --

THE COURT: You mean he would not listen to him de novo. There already had been a long record made at the time of the other proceeding, a related proceeding in the bankruptcy, at which Mr. Nogg testified.

Misrepresenting what's occurred here will get you exactly no place because I am familiar with the record.

MR.WISEHART: Your Honor, may I bring to your Honor's attention the differences between the prior proceeding and this proceeding?

In the prior proceeding Mr. Nogg was testifying specifically upon a proposal that was made as an alternative to reorganization.

He did not testify specifically and at length upon the prospects of reorganization considered as reorganization itself. In that prior proceeding some of

Mr. Nogg's testimony we admit would be relevant to the case before your Honor.

Also we admit that the testimony of Selig Altshul, who is a noted transportation consultant and who testified that it would be possible in his view to resume operations with limited capital in this situation would be relevant. Also relevant testimony in the prior proceeding would be that testimony which was offered by Dr. James Nelson.

Dr. Nelson is a noted transportation economist from Amherst College who in connection with his professional responsibilities has made a study of a number of transportation companies, particularly in the field of transportation in which REA was engaged, and that is known as the small shipments market.

Dr. Nelson had also specifically studied REA as an expert witness in connection with what the railroads had done to REA in the years particularly after 1959 when they drained the assets out of the company in anticipation of unloading it and letting it die.

Dr. Nelson also has made a special study in the course of his professional duties for American University under contract with the Department of Transportation in the small shipments field and UPS.

Now, United Parcel Service as your Honor

probably knows is one of the most successful transportation companies in the country operating in a related field to REA's field and making vast profits.

Dr. Nelson also testified that in his opinion it would be possible for REA to resume operations with limited capital.

Now, that evidence in the other case we submit is relevant here. But in the other case were involved certain projections involving the specific proposal that Mr. Nogg was testifying about which would not be essential for your Honor's consideration in this case.

The reason those are not essential or a necessary part of this case is because your Honor is not reviewing the other case, that was before Judge Werker. What your Honor is focusing --

THE COURT: I am aware of what I am supposed to be doing and I would appreciate your directing your attention to that problem.

MR. WISEHART: Your Honor, I am endeaving to do so.

The problem is this: You have a company which was adjudicated bankrupt in November 1975. The adversaries in this case take the position that because, from the period of February 18, 1975 to November 6, 1975, when

it was under Chapter XI, it lost $19 million, that is conclusive proof that it cannot today be reorganized successfully.

In connection with that contention, your Honor, I would like to describe the situation that was involved during February to November of 1975. The company just prior to February '75 had completed its first successful profitable year in many years. The new management of REA had taken the company from a $43 million loss to a profit of between 2 and $3 million in 1974. The recession hit it at that point and with a negative net worth it had no choice but to go into Chapter XI. The recipe, however, for converting a $43 million loss to a profit of between 2 and $3 million then is extremely relevent to the situation now because the recipe was to take the fixed costs that were attributable to obsolte and redundant facilities and cut them out. I was involved in the thing in 1969 and I can tell you what was done at that time. There were over 700 terminals, many of which had been converted from abandoned railroad stations, horse barns and other types of archaic fixed facilities that cost money in terms of taxes, investment, inefficient methods of operation.

The company had just completed in 1969 laying the foundation for the conversation of the operation

from one which relied upon the passenger train for providing line haul between the cities to one which relied upon more modern, more competitive truck operations between the cities.

As your Honor knows, the passenger t. in at that time was going the way of the carrier pigeon, although it is now beginning to resume.

The company in 1969 was confronted with the need for a major technological change in operation. This technological change was accomplished from 1969 to 1974 successfully by reducing those fixed facilities that I mentioned to your Honor.

The 700 terminals and the costs attendant on those terminals were slashed so that by 1975 there were approximately 300 terminals involved. That was what made it possible for the company to begin making a profit.

In 1968, in anticipation of this technological change from passenger train operations or railroad operations to truck operations for the transportation between cities, the company acquired extensive authorities before the Interstate Commerce Commission.

These authorities are, as I said, temporary authorities, but they have been kept in effect by the Commission, which is somewhat sensitive to the plight of REA

and the need for its continuing services and the concern of its employees, those temporary authorities have been kept in effect to date, although they are now subject to challenge in Washington.

Now, it is undisputed by other parties in this proceeding that those temporary authorities, if made permanent, have a potential value of 50 to $100 million.

As I said, your Honor, from '69 to '75 it was a continuing progression in the line of profitability by reducing fixed costs.

In '75 there was no choice but to go into the Chapter XI situation because of the recession and the lack of capital, the negative net worth which the company had inherited from the railroads. However, during the Chapter XI period further progress in that direction was made and those 300 terminals that I mentioned to your Honor before were reduced to something in the neighborhood of 100, as I recall.

Now, it is true that a representative from Price,Waterhouse testified that during that period there had been a loss of 18 to $19 million, but let's examine the situation involving that loss.

During that period of time there had been a wildcat strike of approximately 10 days which grew out of

labor unrest and lack of confidence in the company at that time.

That wildcat strike happens to be in a field of which I am quite familiar based upon my own experience and background and I would say, your Honor, that the cost of the wildcat strike in terms of lost revenues and increased expenses, lost revenues because of customers like J.C. Penney who turned off the business, would be in the neighborhood of 10 to $12 million.

You take that away from your analysis of what happened during the Chapter XI period and you have a very different situation presenting itself. You have a definite upturn and anyone who is familiar with the use of comparative transportation statistics knows that to be accurate, situations such as a wildcat strike should not properly be regarded as indicative of the true transportation prospects of the company involved.

Now we come to the period after adjudication. At that point the company did not stop operating entirely. During the Chapter XI period a very potent seed had been planted in very vigorous fertile soil, your Honor, and that seed was the so-called Special Commodities Division or REXCO operation. The REXCO operation was the outgrowth of the recommendations which Mr. Nogq himself had made

when he was executive vice president of REA as long ago as 1969, but had not been implemented until June of 1975.

I think this is a very significant thing, your Honor, because one of the contentions about the possibility of resuming operation has to do with the need for capital.

I invite your Honor's attention to the fact that the Rexco operation was initiated and started by a company that was entirely without capital, no capital at all.

It was started in June of 1975. As I say, your Honor, when REA was adjudicated a bankrupt that Rexco Division was a success.

Now, it is not disputed on this record that the Rexco Division itself is capable of producing a profit at present levels of approximately $2 million a year.

Think of what an enormous thing that is, your Honor, if you put it in the context which I have given you before. Here was a company in 1969 through 1975 struggling and scratching to come from a $43 million loss to a profit of about $2 million and that was thought to be such a tremendous accomplishment, as it was.

But here we have a Rexco operation that was started in June of '75 by a company that was ina Chapter XI proceeding and without any capital whatsoever and today

is producing and capable of producing a profit of as much money as that tremendous effort from 1969 to 1975.

Now, why is that possible? It is possible because it is a different concept involved, it is possible because the operation itself does not rely on high fixed costs in order to be profitable.

The costs involved in that operation are variable costs. In other words, they are costs that accue only because there is revenue to offset them. There are not fixed costs that relate to obsolete railroad terminals, horse barns or such facilities. There are not unnecessary real estate taxes.

We have here a successful Rexco operation. Now, the real question is can that seed that has sprouted and done so well be the basis of a gradual explanation in the profitability of REA's operations using the same variable cost concepts.

Now, that was Mr. Nogg's proferred testimony would have dealt with. You take this as a building stone, a successful operation that was started without any capital whatsoever by a Chapter XI company, you use those profits which are protected by the tax loss carry forward which the trustee in this case has totally ignored as a means of accruing capital and you use those together

with possible recoveries from major litigation against the railroads and others in which the total amounts claimed are over $500 million, you use those the same way you did the Rexco operation to build it back into profitability.

Now, that's what Mr. Nogg would testify. Counsel for the trustee say --

THE COURT: Can I ask you a question?

MR. WISEHART: Yes.

THE COURT: Did you make that as an offer of proof before Judge Galgay?

MR. WISEHART: Yes, your Honor.

THE COURT: All right. And he rejected it?

MR. WISEHART: Yes.

THE COURT: All right.

MR. WISEHART: Now, let me say, because I think this is also relevant on that particular offer of proof, one of the things that Judge Galgay was concerned about and one of the things that counsel for the trustee talk about is a complete red herring in this case insofar as it involves the Chapter X petition, and that is this:

Counsel for the trustee say that these petitioning creditors in this case have some unholy intent to grab onto the 6 or $7 million that's already been realized from the sale of the properties, the fixed assets of

REA and drain those off on a wild kind of injudicious application and that without that money the Chapter X reorganization cannot proceed. That is flatly inconsistent with Mr. Nogg's offer of proof.

His offer of proof was that it would not be necessary to utilize the 6 or $7 million in order to make this company grow and resume operations.

Mr. Nogg also feels, however, that the creditors should be asked the question of how they want their money used and in this particular record it is clear that the creditor views cannot possibly be entertained because there is a back office mess in the files of the bankruptcy clerk.

There was an offer of proof by a distinguished accountant and computer analyst that the files in the bankruptcy court are in a state of complete chaos; that over 4,000 creditors' names have been withheld from the mailing that have been sent out concerning notices of where these proceedings would take place, so the sum and substance of that is you have to have a big law firm in order even to get your voice heard ifoyou are a creditor in a case where the files are in a complete anarchy.

Now, Mr. Nogg's offer of proof also was that when he was the trustee of Yale Express he took those files into his personal custody, each creditorb claim was

acknowledged, each creditor claim was evaluated into 12 to 24 categories and there was fair dealing, there were constant meetings with the creditors. In this case, despite bankruptcy Rule 204 which require such meetings to be held between ten and thirty days, there has not yet been a first meeting of creditors since the adjudication of this case in November of 1975.

So the question is who does the trustee represent when he decides, contrary to the views of a distinguished transportation expert like Ralph Nogg, who has disclaimed any interest in being trustee in this case.

The trustee is a person who has not had transportation experience and who we submit is not qualified to maek a judgment on whether this matter can be successfully rehabilitated.

Now, in addition to Mr. Nogg we offered proof from former executives of the company who had supplied memoranda to the trustee, one of which was March 25, 1976.

I think that's Petitioner's Exhibit No. 2 in the file before your Honor in which Mr. Ray Miller who then was aware of the Rexco operation and had absolutely no motive to color his judgment as he was leaving the company in any event, stated to the trustee, and Mr. Miller had been the vice president of operations of the company.

He stated "There is no question that there is a real need for this type of service, nor is there any question in my mind that an express operation can be reinaugurated --" and this part I would like to emphasize -- "with a minimal capital investment."

This is Mr. Miller's statement, a man who was entirely disinterested when he made the statement and who made it, as I say, after the Rexco operation had become a success and after the adjudication of the company. It was that type of concept which Mr. Nogg and the others, the petitioning creditors who I represent were working on.

I think, your Honor, I should tell you how Mr. Nogg came into this situation initially.

As I think I mentioned earlier, Mr.Nogg had been the executive of REA in 1969 and there had been disagreement with management on several matters, such as their failure to make it an employee-owned company and their failure to start operations like the Rexco operation which proved a success and other disagreements.

Mr. Nogg left and completed his successful service at Yale Express as the trustee in Chapter X of Yale Express, which all the creditors, as I believe, were paid off and there was something available for the stockholders. In February of this year, about the time that

Mr. Miller wrote this memorandum, and I was special counsel to the trustee, I saw Mr. Devlin, who is the International Vice President of BRAC and I knew that they had been trying to resurrect the express company in some form. Mr. Devlin and I had been adversaries, but respected each other because we both sought the salvation of the company for many years.

I asked Mr. Devlin how he was proceeding with his plans. The trustee was interested at thattime, too.

He spoke about the company rising Phoenix like out of the ashes. Mr. Devlin indicated to me that the plans had not progressed too far.

I said to him that I felt that what he needed was absolute management integrity and visibility in order to succeed in reorganizing the company successfully.

As a test of Mr. Devlin I said "Would you be willing to accept -- would the employees be willing to accept Mr. Nogg as a means of showing good faith, willingness to make this work because I knew of his reputation and his success."

Mr. Devlin's answer to me was an unqualified yes. Everything progressed from that period forward.

Now, going on, we have offered in evidence, as I believe Petitioner's Exhibit No. 1, a memorandum

from Mr. Tom Cole, who was President of REA.

The memorandum is dated February 1, 1976, in the same time frame and it discusses the same subject, the prospects for a successful revival of the Express Company, even though it had been adjudicated a bankrupt, even though the fixed assets were being sold.

I respectfully invite your Honor's attention to this memorandum because I think that Tom Cole is also a highly respected figure in transportation, a man who wrote this memorandum at the trustee's request at a time when Mr. Cole had no self-interest to promote because he knew he was leaving the company, I believe that week.

I believe this was his final memorandum.

There was absolutely no ax grinding in this . Mr. Cole's memorandum concludes, and it really is unfair to the memorandum to attempt to summarize it because it is an excellent, excellent memorandum.

Mr. Nogg has reviewed it and he feels that many of the concepts in this memorandum are the same ones that he himself for many years had been advocating. In fact, that would have been his testimony, but the conclusion of the memorandum is as follows:

"REA can truly be the supermarket of transportation. It's range of service is unlimited, from ware-

housing to packaging, assembling, distribution, courier service, et cetera, you name it, and this can be done through franchising or through normal organizational channels. The basic elements are here to be exploited."

Your Honor, in this memorandum he discusses such things as the market need for REA's services, REA's extensive operating authority, the fact that the union leadership is now sympathetic to the problems of the Express Company.

If there was a lesson to be learned, that lesson has been learned in spads.

Now, the union's positive attitude would now make possible --

THE COURT: I have been listening now for 45 minutes. You asked for a half hour.

MR. WISEHART: All right, your Honor. I appreciate your Honor's attentiveness.

I would like to go to one other --

THE COURT: All right, I am not closing you off, but there comes a time in the interest of shortness of life when I will have to.

MR.WISEHART: Yes, your Honor, I realize that. I never know quite how much depth you wish to hear and I appreciate --

THE COURT: I would still like you to address the point where are Judge Galgay's reports and findings clearly erroneous. That's the problem before me. You haven't addressed it at all. I have been listening for 45 minutes.

MR.WISEHART: Your Honor, I have not seen them.

THE COURT: See it and then I will come back and address yourself to it. I will take a recess while you read it.

MR.WISEHART: Thank you.

(Recess.)

THE COURT: All right, let's proceed.

MR. WISEHART: Thank you, your Honor.

Addressing myself to the report of Judge Galgay, we submit, your Honor, that the statements on page 3 thereof dealing with the conflict of interest issue are clearly erroneous for the reasons set forth in the memorandum which we submitted earlier today and we will not repeat the reasons.

THE COURT: I would appreciate your just telling me briefly what they are.

MR. WISEHART: Yes, sir.

Judge Galgay states in that paragraph, which I

might add does not appear to have been prepared in his office because he has modified this report that was prepared in someone else's office --

THE COURT: Of course Judge Galgay doesn't have a cast of thousands.

MR. WISEHART: That's true.

THE COURT: I suppose like any busy judge in the busiest court in the country, including this district court and the bankruptcy court, he doesn't have time to have his secretary spin her wheels copying and revamping and rephrasing and editing findings.

If lawyers present findings with which he is in agreement, those are his findings. It doesn't mean at all that he hasn't exercised his own mind to the problem.

MR WISEHART: Of course, your Honor. I just have happened to have read the cases under Rule 52.

THE COURT: I happen to have read them, too.

MR. WISEHART: We think it is inappropriate that these be prepared in an office in which the conflict of interest issue is involved and adopted by Judge Galgay as such. On that particular issue --

THE COURT: That's a mere matter of clerical labor. What is wrong on the merits? I wish you would address the merits.

MR. WISEHART: I will, your Honor. He says that we failed to make a motion to remove the trustee and that that's the only way the conflict of interest issue could be raised. That is not true.

In rhe first place we have made a motion. We have made a motion to disqualify and with the memorandum in opposition we stated that we are moving to remove --

THE COURT: When did you make the motion?

MR WISEHART: In our memorandum today.

THE COURT: But you did not make it at any time prior to this.

MR. WISEHART: We beheved that the --

THE COURT: Answer my question.

MR. WISEHART: We believe that we did, your Honor.

THE COURT: Did you make it prior?

MR.WISEHART: We asked him to resign. What does one have to do?

THE COURT: When did you move to disqualify him?

MR. ISEHART: He said he was taking it under advisement.

THE COURT: You are just being evasive. I have heard enough of you.

MR. WISEHART: June 14th, your Honor.

THE COURT: You are just evasive.

MR.WISEHART: Judge Galgay stated, your Honor, that he was taking the matter under consideration, under advisement. We asked him to consider it. Now may I go to the other specific assignments of error, your Honor?

THE COURT: Yes.

MR. WISEHART: Thank you.

In the findings of fact, finding No. 3 deals with the alleged loss of $19 million in the Chapter XI period.

We submit that there is no evidence in the record to support that. That was not a part of the hearing yesterday.

Finding 4 states that the debtor requested that it be adjudicated --

THE COURT: Are you telling me that Judge Galgay can't consider earlier testimony in the bankruptcy proceeding as part of that hearing as the evidence?

MR. WISEHART: I am telling you that we have a right to cross examine.

THE COURT: You were present, were you not, with a right to cross examination when these issues were touched upon?

MR. WISEHART: That was not an issue at that

time, your Honor.

Finding No. 4 says that on November 6th the debtor requested that it be adjudicated a bankrupt because it was unable to meet its current payrolls.

Your Honor, we don't believe the debtor requested that it be adjudicated a bankrupt. Certain officers of the debtor may have.

The attorneys recommending the debtor at that time are here. They can add clarification, but we do not think the record supports that statement. These officers were acting in their own interests.

Item 5 states that from February 18th through November of 1975 the debtor promised its suppliers of goods and services that it would pay 40 percent of current operating expenses exclusive of payroll.

We know of no evidence in the record that supports that. There was no hearing on this yesterday. I don't know where it came from. Item 7 says that the trustee was duly qualified. Your Honor has already heard me state that there has never been a first meeting of creditors as required under Bankruptcy Rule 204.

The conflict of interest issue has been raised and the creditors have never been informed of that issue.

I do not believe that the record supports

that conclusory statement.

Item 8 says that on May 24th this Court signed an order bringing on the All-Trans offer for hearing.

Your Honor, I state that it was my understanding and belief that the order was supposed to bring also on the Reamco proposl for a hearing.

Now, counsel for the trustee on appeal before Judge Werker for the first time contend that the hearing was not adequate for the purpose of considering the Reamco proposal after we had invested hundreds and hundreds of hours and thousands of dollars in the development of that proposal at the specific request of the trustee, the first proposal that was made for the acquisition of the stock of REA Express.

We contend that in a good faith hearing, as Bankrupty Act Section 146 specifically state general principals of equity also apply and that those who challenge good faith of a Chapter X petition must have clean hands to do so.

We contend that we were led down the primrose path and that this proposed finding, this finding which Judge Galgay has signed exemplifies that fact. This was fraud.

Now, proposed finding No. 9 says that notice of such hearing was given to all persons who filed claims. That is flatly untrue. The undisputed evidence in the record on the basis of our offer of proof of yesterday by an eminent accountant, Mr. Dermott Noonan is that over 4,000 claimants, creditors never received notice of any of the proceedings in this bankrupt estate because their names were never given to the company that sent out the notices.

Of course, these would be the claimants who do not read the New York Times, the Wall Street Journal and the Traffic World on which the trustee and Judge Galgay rely on as providing adequate notice. These claimants would be the wage earners, the humble, little tradesmen in a small town in Wisconsin who ship goods, for whom the bankruptcy act is supposed to provide specific protection.

This was not given. Your Honor knows what the standards are of notification for people who have equity interests through the SEC rules. The Bankruptcy Court is the court of equity.

Why should the standards in the Bankruptcy Court be any less?

Why should the standards allow a chaotic condition to exist in the file room involving claimants who are not able to hire expensive lawyers and make enough noise

for their claims to get some attention? Proposed finding 10 says that the notice referred to in finding 9 was sufficient. For the reasong that I have just said it was clearly insufficient, particularly when the condition was aggravated by the fact that there was never a first meeting off creditors, there was never anything done to organize the creditors as required under Bankruptcy Rule No. 204.

The counsel for the trustee rely on the fact that thereis an executive committee of creditors who are on the executive committee. The Penn Central Railroad, a company who for months if not years has been seeking the liquidation of this company, an airline which represents a group against whom REA has higher claims than they have against REA -- REA's claims against them are about ten times greater, enter a transportation consultant who would expect to be sensitive to the views of potential sources of business. So we contend on that basis that proposed finding No. 10, which was adopted by Judge Galgay, was clearly erroneous because that could not be a sufficient notice.

Proposed finding 11 which Judge Galgay adopted was that no other creditors at the hearing on the Reamco and All-Trans proposal objected. My recollection is that another creditor specifically got up, the Flexi-van Company

and objected to the fact that it had not received a notice.

Proposed finding 12 which Judge Galgay adopted misstates the record in terms of the Chapter X petition. Under our reading of the bankruptcy rules the proper procedure was to offer the petition to Judge Galgay for filing. It was offered and we have stated our reasons in our brief which your Honor has before you in the appendix for believing that that was the correct way. The bankruptcy rules, as your Honor knows, were promulgated by the U.S. Supreme Court and they do have the force of law.

13 is erroneous because we tendered the fee at the time the petition was submitted to the bankruptcy court for filing and for the same reason finding 14 is wrong.

Finding 15 and 16 have to do with what the clerk of the court did. There is absolutely no evidence in this record, no one from the clerk's office is a witness. Finding 18 deals with something that we think is clearly wrong and improper. It states that by order dated July 27, 1976 this court, the Honorable Roy Babitt, Bankruptcy Judge, approved a contract between the trustee and All-Trans for the sale of the operating authorities. In effect, your Honor, this so-called approval was obtained on an ex parte basis in Judge Galgay's absence

without notice to any of the parties in the proceeding before Judge Galgay and departed substantially from what Judge Galgay had approved on July 10th, an issue which we had raised on appeal before Judge Werker. Among other things the contract approved by Judge Babitt gave All-Trans an out if the ICC refused to approve an acquisition which would allow truckload operations of general commodities. Now, general commodities in transportation, your Honor, is a broader category than special commodities. The loophole thatwas left in the All-Trans contract that Judge Babitt approved on an ex parte basis completely undercut the basis on which before Judge Galgay the trustee in All-Trans argued that they would accept this whether or not they were able to keep the Rexco operationg going.

Also it signficiantly altered the financial aspects of the proposal that All-Trans had made before Judge Galgay reducing the amounts which the trustee would expect to receive and other unfavorable changes.

19 says that only Reamco appeals the decision of July 16th to Judge Werker, but counsel for the trustee knows that Reamco also was the assignee of a number of these creditors and was fully entitled to assert their right.

Finding No. 22, your Honor, states that the clerk of this court referred such petition, the Chapter X

petition to you to hear and report on the issue of good faith.

Now, your Honor has said earlier today, I believe, that you remanded it to hear and determine. In view of that it seems clear that finding No. 22 is incorrect and that Judge Galgay's understanding of the entire proceeding was incorrect.

Finding No. 23 states "That by Judne 23rd the trustee has sold all of the operating assets of the bankrupt except for the operating authorities and certain small isolated parcels of real estate. That all personalty whether located in such isolated parcels or not,have been completely sold."

We submit that this finding is incorrect because it ignores the fact that an appeal is still pending regarding the so-called All-Trans transaction.

Finding 25, your Honor, states incorrectly that there is no business left to be reorganized since the bankrupt no longer possesses the resources of going concern. That's flatly incorrect based upon what I already told your Honor about the operations of the Rexco Division, the fact that it is producing profits in the neighborhood of $2 million per year and revenues of 20 million after being in operation only a little over a year.

Pr-posed finding 26 which Judge Galgay adopted states that the sole remaining assets in the bankrupt estate consists of between 6 and $7 million in cash, isolated small parcels of real estate and claims. This completely ignores REA's authorities, which as I stated before, are still subject to litigation and its principal asset with a potential value of 50 to $100 million which the Chapter X filing seeks to preserve and we are confident would preserve by putting a different light on the situation before the ICC. It also ignores these major litigations which I referred to earlier, your Honor, in which claims against the railroads and others exceed $500 million. Proposed finding 30 states that the liquidation conducted by this trustee is the best method of preserving the remaining values for those entitled to share in such values.

Now, your Honor, we know of absolutely no evidence in the record in support of that position. The trustee has never been a witness. We have never had an opportunity to cross examine the trustee. In the proceeding involving the Reamco proposals and the All-Trans proposal there was an expert witness who got up and testified in favor of the All-Trans proposal, but he was trying to sell a bill of goods and that certainly had

nothing to do with this finding that liquidation being conducted is the best method of preserving the remaining values. That has never been an issue. That is one of our chief grounds of contention on the conflict of interest point, that those who should be consulted on this issue are the creditors.

They have never had an opportunity to be heard on this issue. It has been handed to them as a fait accompli. The trustee was qualified the day after adjudication.

THE COURT: We will interrupt now. We will take a short recess.

Let the record note that we have spent an hour and 25 minutes with you.

(Recess.)

THE COURT: All right, Mr. Wisehart, you may proceed.

MR.WISEHART: I will resume with finding No. 31, your Honor, which I think is a crucial finding so, I will take the liberty of reading it.

"It is unreasonable to expect that a plan of reorganization can be effected as a result of the filing of the Chapter X petition."

Your Honor, we have made our offer of proof

which is in the record. The offer of proof is substantially what Mr. Nogg would testify. Mr. Nogg however is not a person to whom one can do justice simply by making an offer of proof. It is presumptuous for me tomake an offer of proof regarding a man who is preeminent in transportation, a man who is over 60 years old and who has had his great wealth of experience, both in transportation and in Chapter X proceedings.

Your Honor, I respectfully submit that the offer of proof concerning what Mr. Nogg testified to was corroborated by the offer of proof concerning Mr. Dermott Noonan, who was also present, who had been associated with Mr. Nogg in the past at the Yale Express bankruptcy, in connectionw ith Associated Transport and other matters. Mr. Noonan is a certified public accountant of standing in that field. He has taught accounting at Yale University and other institutions of higher learning and he does know Mr. Nogg in great detail and the results that he has achieved.

Finally I wuld like to submit to your Honor that Mr. Nogg is known by people who are available to this Court such as the Securities and Exchange Commission, the Interstate Commerce Commission, people who have worked with this Mr. Nogg in connection with his other activities.

The consensus, if one wishes to talk to such people, is that if Mr. Nogg says that something can be done it can be done. The question might be raised why was it that the Chapter X petition was not filed previously and we have addressed that in our brief, but I would like to state that it is clear that it was presented to Judge Galgay as an alternative and we thought a less controversial alternative.

Judge Galgay had rasied questions about the availability of financing in connection with the Reamco proposal and our position on that was that commitments have been made, Mr. Nogg's testimony was that based upon his experience with financial institutions, which was considerable, that he was satisfied that there were commitments and if therewas any question, give them two weeks to present to the Court satisfactory evidence that the commitment would be complied with.

Other questions involving the Reamco proposal which had been raised at the hearing forthe first time was whether or not the assignment of the employee's claims in the Chapter XI proceeding would require a public offering and an SEC registration. There were other questions such as the quantum meruit value of the employees' Chapter XI claims.

Mr. Olick had given an opinion that he thought

they were worthless. That was briefed before Judge Galgay and the matter was not determined. Clearly we have a different point of view on that issue. Mr. Kahn for the trustee said that and issue like that would have to go through appeals and what not to be determined finally and Judge Galgay did no even make an initial determination so that having worked as long and hard as had been worked and recognizing that there were aspects of the Reamco proposal which were controversial we thought, based upon Mr. Nogg's experience, that an alternative might be presented which would preserve the rights that the company has at the ICC by putting a new face on the situation. Those rights, as I stated before, are called temporary rights. It is our position that they need the identification with those who have invested their lives in being career expressmen to be preserved for -he benefit not only of the expressmen themselves, but of the creditors.

So the Chapter X petition was presented in that context and it is basically the same context we have today. In all duedeference, both to this Court and to Judge Galgay, and recognizing that Mr. Nogg is an expert who far surpasses my own transportation experience, although I have had considerable transportation experience, too, it does seem to me that as a practical matter proposed finding No. 31 is

totally without support of any evidence in the record in the light of the offer of proof that has been made.

We thought that this is the kind of thing that a good faith hearing was supposed to elicit. Mr. Nogg had prepared his testimony, he had prepared exhibits and he was able to testify, not only testify, but answer questions. Our feeling about a court of bankruptcy is that they have the attributes of a court of equity and that in many respects the approach is a pragmatic reproach in that Mr. Nogg was the person who could answer pragmatic questions far better than a lawyer making an offer of proof. So we submit there is no evidence supporting proposed finding No.31 and that it is clearly erroneous.

Proposed item 32 is that the conflict of interest sort to be raised has not properly been raised. For reasons that I have already stated and that are set forth in our memorandum in opposition, we disagree with that contention. WE have sought to raise that.

We were told that it was being taken under advisement. Yesterday apparently Judge Galgay reached a conclusion contrary to his prior representations to us.

THE COURT: There is no such representation on the record.

MR. WISEHART: Yes, it is in the papers

supplied to you, your Honor. He stated specifically in the transcript that he was taking the matter under consideration.

THE COURT: What page? Could you refer me?

MR. FRIOU: Your Honor, on August 18th.

THE COURT:On what page?

MR.FRIOU: We don't have the page here. That was on a motion for one thing.

THE COURT: I want the page in the record.

My question is clear. I raise it because I had a similar problem with you, Mr. Wisehart, when I asked for briefs last Friday and didn't get them until Monday.

MR.WISEHART: Your Honor, I wish to apologize. I misunderstood that.

THE COURT: Perhaps you misunderstood Judge Galgay as well.

MR.WISEHART: No.

THE COURT: All right, proceed. I think I have heard your position. I have it and I will of course read your briefs, read the transcript. I now want to hear what your adversary has to say now.

MR. WISEHART: Of course. Your Honor, may I say on that particular issue, I referred previously to his findings on page 3 in that he deletes certain of the materials

in our appendix as not properly before him and of course we take exception to that particular statement on his report to your Honor.

THE COURT: I am sorry, I can't hear you any further. I have been listening to you now another 15 minutes since our recess. I must hear the other side. The day is about over.

MR. WISEHART: Thank you, your Honor.

MR. KAHN: Your Honor, I promised I would take no more than three minutes and I will do my very best to stay within that purview.

THE COURT:In view of the length that your adversary took I won't hold you to that three minutes if you feel you need more time to answer. All right, but if you feel you can do it in three minutes, it certainly will be gratefully received.

MR. KAHN: Thank you, Judge.

Your Honor, hte issue is only whether this Chapter X petition was filed in good faith and whether the decision of Judge Galgay which held thatit was not filed in good faith should be confirmed.

The report should be confirmed because when Judge ;algay wrote that report he had before him the experience of innumerable testimony from February 18, 1975

to the present day. He had before him, based on his own knowledge, all of the many attempts which had been made by the debtor in possession during the Chapter XI period to reorganize this corporation. He had before him all of the various suggestions which had been tried by Arthur Andersen and their management team to reorganize this company, by Price, Waterhouse & Company, the accountants ultiamtely during during the debtor in possession period and all of their attempts. He had before him all of the witnesses who had testified on what was being done and all of the comments which the counsel for the creditors committee had made during the entire Chapter XI period.

He knew all of that. All that was before him. He also had before him the specific record of the debtor consenting to the adjudication on November 5th, 1976 for the reason expressed by the debtor, that the company no longer meet the payroll, that it was out of cash.

He remarked himself at yesterday's hearing that he remembered the innumerable proceedings which had been brought during the Chapter XI period by Chapter XI administration creditors who had been promised 40 percent of their claim down, 60 percent over a period of time and never even received the 40 percent down, never mind the 60 percent. He knew that.

He also knew that at the time of this hearing, at the time the Chapter X petition was filed that there was nothing left in this estate but cash and a few isolated parcels of real estate. There were no operating assets. There were no operating personnel. There were no trucks. There were no terminals. There were no employees. He knew that and, therefore, what was being asked was that the cash which had been built up for the Chapter XI creditors was to be risked again.

That's what he was being asked to do. He also knew that the Third Circuit has recently affirmed a decision of the District Court in the Botany case which was identical to the extent that all the operating assets had been sold and after the sale of the operating assets a Chapter X petition was filed.

The Court of Appeals, Third Circuit, affirmed without opinion a decision of the District Court which held that Xhapter X does not apply in such cases -- we cited the Botany case in our brief -- that after all of the operating assets are liquidated there cannot be a reorganization.

It is a speculation to invest this money, whether it was Mr. Nogg or any other entrepreneur. There is not a reorganization. Judge Galgay also knew that the

$7 million which were left in the estate today was money which would in itself was insufficient to pay the Chapter XI creditors and these petitioning creditors are not Chapter XI administration claimants. They are pre Chapter XI claimants and that wouldmean that any money that's lost to this reorganization would be the money of the Chapter XI creditors who would be lost and, therefore, the petition could not have been filed in good faith when the creditors who stood to lose the money were not the creditors who had asked for the petition in the first place.

Judge Galgay also had listened to Mr. Nogg's testimony on the All-Trans hearing, that is the hearing on the sale of the operating rights, at which All-Trans turned out to be the successful bidder.

Mr. Nogg had testified for two to three days with lengthy charts and with accounting data to all of the information which was sought to be introduced yesterday.

THE COURT: Wasn't the petition sought to be filed at that time improperly with the Referee rather than with the clerk of the court?

MR. KAHN: Yes.

THE COURT: The petition that's before me now.

MR. KAHN: The exact petition was handed to the

Court and offered as Exhibit 25 for identification only. No filing fee was paid nor were any copies ever delivered to the clerk.

THE COURT: Was Nogg's testimony directed to the allegation of that petition?

MR. KAHN: No. Nogg's testimony was directed to showing that a brand new express company could be created from ntohing, from $3 million in cash which is the working capital he expected to have and did not have and that based on the $3 million of start-up capital he testified in great detail how much volume he would do monthly, how many trucks he would need, how many terminals he would need, the rpecise amount of traffic going in and out of those terminals, what the total revenue would be at the end of the year, what the profits would be, the precise rights which would be followed,all of the very testimony which Mr. Wisehart now claims was rejected by Judge Galgay yesterday. Indeed it was, your Honor, only for the reason that Judge Galgay had had three days of it with all the exhibits before him on the hearing of the sale of the operating rights.

THE COURT: What about the Rexco point that your adversary makes?

MR.KAHN: Your Honor, Rexco is a delicate mat-

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ter. The Rexco operation was a matter which has been correctly stated by Mr. Wisehart to be a special commodities tariff operation that was started using the major operating authorities of REA in the latter part of the Chapter XI proceeding.

When the trustee qualified on November 7th he was concerned that the operating assets -- that is the operating rights of the bankrupt be sold. He knew that there were provisions that unless traffic was carried under the operating rights, that the ICC might rule that the operating rights had died and that would lose the value of these assets. Therefore, in order to save some value for these assets, these assets being the operating rights which were ultimately sold to All-Trans, he obtained an order from Bankrutpcy Judge Galgay authorizing him to continue that minimal operation in the hopes that the continuance of that minimal operation would keep these operating authorities alive long enough so that they could be sold at a public hearing and receive approval from the ICC on the theory that by operating this Rexco Division, that the rights had not died through lack of use. That is the Rexco operation.

THE COURT: Is it true that it needs a profit of $2 million a year?

MR. KAHN: No, your Honor.

At the time that the trustee took over its net profit from its inception was $35,000. After the trustee took over I think he lost money the first month, he made the money back the second month and since that time both the volume and the profit have increased.

THE COURT: Were those figures before Judge Galgay2

MR. KAHN: Oh, yes, your Honor. All of those figures were before him.

THE COURT: At the time of the All-Trans hearings?

MR. KAHN: Yes, your Honor. In addition to that since a trustee may not operate in a bankruptcy without a special order of the Court, the order authorizing the trustee to operate the Rexco Division is renewed every 30 days. Every 30 days that the trustee requests an additional extension of 30 days, the trustee files with the Court a report of the Rexco operation so that the Court had before it the most recent report of the precise volume and the precise profit of Rexco for the immediate preceding 30 days.

THE COURT: Plus periodic examinations there.

MR. KAHN: Yes, indeed, your Honor. From the

inception of the bankruptcy administration. Judge Galgay had all of that material in front of him and he had as I pointed out the lengthy and detailed projection of Mr. Nogq, which were offered yesterday again and the Judge quite properly said that he was familiar with all of those projections; that he knew all of Mr. Nogq's testimony and that all of Mr. Nogq's testimony was before him. He was considering it in reaching a decision on this matter also.

THE COURT: Those were the hearings to which he specifically refers in his report, are they not?

MR. KAHN: Yes, they are, your Honor. Those were the hearings which commenced on June 23, 1976 and went on the 24th, the 25th, I believe the 30th and then some days in July.

THE COURT: July 1, 8 and 9.

MR. KAHN: Yes, those are the specific hearings referred to by Judge Galgay which dealt with the question of the sale of the operating rights, and I might correct one other statement made by Mr. Wisehart that the Reamco proposal was not considered.

The REamco proposal was considered at great length. The time given tothe REamco proposal at the hearing was at least three to four times the amount of time de-

voted to the All-Trans proposal.

THE COURT: What's the relevance of the Reamco proposal to the issue before me?

MR. KAHN: As far as I can see, your Honor, there is not an element of relevance. The REamco proposal has been sought to be made relevant in this case, in that these petitioning creditors were all beneficial owners of Reamco and Mr. Wisehart conceded at the hearing on the operating rights that if Judge Galgay would award Reamco the operating rights instead of All-Trans he would withdraw the Chapter X petition and, therefore, this Chapter X petition is really a collateral attack on Judge Galgay's decision to give these rights to All-Trans.

THE COURT: I see. The All-Trans Reamco affair is on appeal in the Court of Appeals as I understand it.

MR. KAHN: No, your Honor, it was on appeal to Judge Werker, except that when Mr.Wisehart filed the Chapter X petition that operated as an automatic stay, so Judge Werker, realizing that he was stayed, sent the matter back to the clerk. Once this matter is determined and if it is determined that the petition was not filed in good faith, then the xlerk will send the appeal right back to Judge Werker.

THE COURT: All right.

MR. KAHN: Your Honor, very little else need be said. With respect to the major litigation mentioned by Mr. Wisehart, these major litigations, as far as they relate to antitrust suits against the railroad, I believe there were three major ones. Two of them have already been dismissed by the District Courts with prejudice and presumably notices of appeal have been filed, but not prosecuted. Therefore, these major litigations which are to finance the organization in our humble opinion at least at this time just be valued at precisely zero. I would also like to make reference to the tax loss carry forward which the trustee is supposed to have overlooked. One of the first elements the trustee requested me to look up was the issue of the tax loss carry forward and since I specialized in bankruptcy work for 26 years I have some familiarity not with the tax provision, but my firm has researched that question on innumerable occasions. My tax partners have advised me on innumerable occasions that unless the order of adjudication is vacated, which is absolutely impossible in this case, that there is no tax loss carry forward.

When the debtor REA was adjudicated a bankrupt that was the end of the tax loss carry forward. All of the ingenuity in the world cannot restore it.

So therefore, there is not a shred of merit in the argument that by granting the Chapter X now, that one penny of the tax loss carry forward can any longer be saved. I would also like to make a very brief comment, and it will be my final comment, on the issue of claims and notice.

I would like to pointout that it is absolutely elementary that when a bankruptcy petiton is filed, if it is a straight bankruptcy, a first meeting of creditors called for one purpose, and that is for the creditors to prove their claims and elect a trustee. Then the Bankruptcy Act makes no further provision for any other meetings of creditors. Therefore, this lengthy argument we have heard of Mr. Wisehart that the Bankruptcy Court should have continued to call the creditors before it is nonsense because the Bankruptcy Court cannot call the credtiors before it again except for the final meeting and the final meeting may not be held until all of the assets have been liquidated into cash and all of the claims have been disposed of.

Therefore, the argument that the trustee should have continued to call the creditors together has not a shred of merit and in addition to that, assuming that the trustee has called all of the creditors, and assuming that the Bankruptcy Court had called all of the creditors, there is no provision for the creditors to vote on anything

that the trustee does. The trustee has the responsibility of carrying out the liquidation without the benefit of delegating that responsibility to anyone, without the benefit of any advisory committee of the creditors.

If he makes a mistake he is personally liable and he ma be surcharged, but he carries that responsibility alone. The whole concept of the Bankrutpcy Act was that the trustee must be utterly unfettered in his judgment, otherwise he could not possibly liquidate any kind of an enterprise if he was required to call the creditors every five minutes and particularly if nobody knows who the creditors are, because most of the claims are disputed.

Therefore, there is just nothing in that argument.

With respect to the mess in the bankruptcy clerk's office, I don'tknow of any mess, your Honor. I do know that in the 26 years that I have been practicing before this court, that clerk's office seems to have managed. The creditors all seem to get the proper notices.

Whethere there is one or two or ten creditors who didn't get notice in this proceeding, I know nothing about it. I do know, and Judge Galgay so found, that

these attorneys, and all of their petitioners, have had notice of everything. Nobody who has not had a notice has complained.

Therefore, there is no serious complaint before this court. With respect to the issue of the conflict, Bankruptcy Act Section 2(a)17 expressly provides, and a bankruptcy rule whose number escapes me, expressly provides that in order to remove a trustee a motion must be made on notice to creditors and a hearing held. Admittedly Mr. Wisehart has never made such a motion except orally, has never sent out a notice to creditors and there has been no hearing.

Judge Galgay was absolutely correct under the statute and under the bankrutpcy rule in ruling that the issue of conflict has never been before this Court and I should point out, your Honor, that Mr. Wisehart has been told this by Judge Werker at the argument, he has been told this by Judge Galgay, he has been told this by me and he --

THE COURT: I am sorry, Mr.Wiseheart, I would appreciate your not rustling papers and have all the commotion at counsel table. I find it very distracting.

Your adversaries were quiet in an extraordinary

way throughout your argument. They did nothing in any way to distract the Court at all from what you were saying.

MR. WISEHART: Yes, sir. I wish to apologize and state for the Court that it was entirely inadvertent. I was seeking to find the rule in question.

THE COURT: Proceed, please.

MR. KAHN: Therefore, your Honor, Mr. Wisehart has known the proper procedure for most and has steadfastly refused to follow it. I submit that Judge Galgay's report was in all respects correct, completely supported by the record, by all of the testimony and in particular by his exact knowledge of all of these proceedings which have been based on all of the hearings held before him and the official and unofficial conferences since February 18, 1975.

TEH COURT: Would you address yourself to the point of urgency in a decision by me?

MR. KAHN: Yes, your Honor.

Your decision is most urgent for this reason, and that is that after All-Trans was the successful bidder at the sale All-Trans went down to the ICC and has now filed an application for transfer of the temporary notice.

If that temporary authority transfer is approved,

$2-1/2 million will be paid to the trustee into this estate forthwith. In addition to that any revenues which accrue to All-Trans as a result of the use of these rights will commence to accrue a certain percentage to the trustee and until the rights are either permanently denied, which we expect would take six to seven years, or if they are permanently granted, those funds would continue to come into this estate.

At the present moment of time, whether All-Trans is a successful bidder or not is pending before Judge Werker and until a decision is handed down knocking out this Chapter X proceeding Judge Werker cannot affirm the decision which granted these rights to All-Trans.

Therefore, the ICC proceeding has been delayed and will continue to be delayed until we have a decision from your Honor which will enable Judge Werker to hand down a decision on the All-Trans appeal.

THE COURT: But there is no operation of the bankrupt which will be affected in any way.

MR. KAHN: No, your Honor, because Judge Galgay has continued the lifting of the stay until further order of the Court.

THE COURT: In other words, the stay has been lifted.

MR. KAHN: Yes, your Honor. The stay has been lifted for all purposes, but we are subject to attack in the ICC on two grounds: One, that All-Trans may not be the successful bidder and, two, the ground that a Chapter X proceeding is pending which will knock out the All-Trans application and consequently all of that work is being held in abeyance and remains at risk.

THE COURT: I see.

MR. KAHN: Thank you, your Honor. I apologize for taking more than ten minutes.

THE COURT: That's all right, it was with my questions.

There was one other man who wished to be heard here. I haven't heard him at all.

MR. DEER: Your Honor, my name is James Deer with the law firm of Holtzmann Wise & Shepard.

We represent a stockholder who owns in excess of 30 percent of the stock.

Of course in this proceeding if they do what is proposed here all the equity will be wiped out, everything will be only for creditors. We feel that there should be an examination of all these other assets, including the major claims in litigation, which I don't think have yet run their courses.

It takes quite a bit of money just to prosecute those. We think that the prior hearings on the Reamco and the All-Trans proposals really did not get into the question of what the ultimate assets are. They were limited to the merits of those particular proposals carrying out what All-Trans wanted to do and what Reamco, which was the employees company, wanted to do.

Therefore, we feel that the Chapter X petition should be granted. We should look at these assets carefully, get the assistance of the Securities and Exchange Commission so that we can come up with a feasible plan.

Thank you.

THE COURT: Five minutes, Mr. Wisehart.

MR. WISEHART: Thank you, your Honor. The rule that I was looking for on the conflict of interest question is Bankruptcy Rule 221 promulgated by the Supreme Court which states on application of any part at interest, or on the Court's own initiative, and after a hearing on notice the Court may remove a grustee or receiver for cause and appoint a sucdessor.

It was our understanding that the Court was proceeding on its own initiative and we also did ask ask for a hearing on the subject as spelled out in the

papers before you. Now, the specific transcript references that you asked about in this matter are set forth on Pages 12 and 13 of our preliminary memorandum which your Honor should have as part of the file. The references deal with July 9, 1976 and on August 18, 1976.

In the latter matter Judge Galgay specifically said he received an opinion on this from Windels and Marks which we have shown in our papers the belief is erroneous and Judge Galgay stated that I still have not resolved the problem of the question of conflict of interest on the part of the trustee. This is August 18, 1976, pages 18 and 19.

Mr. Friou from my firm who is here stated we feel the issue is so fundamental and pervasive that it sh ·ld be decided by the Court and asks for a full evidentiary hearing on the subject.

THE COURT: But you didn't make a motion. You don't make the formal motions you don't make.

MR. WISEHART: We now have made the motion, your Honor.

If that is necessary to cure the technical defect, and we don't view it as a defect --

THE COURT: I am sure you don't view it as a defect, but there must be a certain formality to these things

and certainly you haven't followed them.

MR.WISEHART: WE thought we had proceeded with Judge Galgay's plan in the way we pursued this matter, your Honor.

If we are to be criticized for it we humbly apologize.

THE COURT: I am not criticizing you, but I don't like you coming here saying people don't do things and they ignore this and they ignore that when my own experience with you is that you don't follow a Court's directions, including those of this afternoon. I have heard enough. I will reserve decision.

MR. KAHN: Thank you, your Honor.

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Filed September 30, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of	Bankruptcy Nos.
REA HOLDING CORPORATION	75-B-0251
THE EXPRESS COMPANY, INC.	75-B-0252
REA EXPRESS, INC., f/k/a	75-B-0253
Railway Express Agency, Inc.	75-B-0244
REXCO SUPPLY CORPORATION,	
Bankrupts,	MEMORANDUM
	45189

MacMAHON, District Judge.

This matter came before us on a motion, brought on by order to show cause, for the appointment of a Receiver to conduct the business of the bankrupt and take charge of its property, with power to do certain other acts as enumerated in the order to show cause.

Upon the return of the order to show cause, it appeared that time was of the essence due to the fact that a Chapter X petition had been filed automatically staying all further proceedings in the bankruptcy court and that there was a genuine issue of fact as to whether the Chapter X petition had been filed in good faith.

The stay seriously prejudiced the estate in that a sale of operating rights, approved by the bankruptcy court and requiring approval of the Interstate Commerce Commission, might be irreparably impaired. It also appeared that a petition for review of the bankruptcy court's

approval of the sale was pending before Judge Werker of this court and decision of that matter would necessarily be delayed while the stay remained in effect.

The matter came before us while we had just commenced a serious criminal trial, and since it appeared that Judge Galgay was thoroughly familiar with all of the bankruptcy proceedings, including the subject matter of the Chapter X petition, and because time was of the essence, we therefore referred the matter to Judge Galgay to hear and determine the issue of whether the petition for reorganization under Chapter X of the Bankruptcy Act, verified June 23, 1976 was filed in good faith. Judge Galgay heard and determined that issue and filed a report containing his written findings of fact and conclusions of law on September 28, 1976.

On September 29, 1976, we heard an oral motion by Whitman & Ransom, and Marcus & Angel to confirm Judge Galgay's report and also heard Wisehart Friou & Koch's abjections in opposition thereto.

We have carefully considered the report of Judge Galgay, the proofs of the parties, and the transcript of the evidence on the hearing before Judge Galgay, and, while more time might improve the fullness of this memorandum, it would not alter our opinion and would only jeopardize the bankrupt estate.

We reject petitioners contentions that Judge Galgay's findings are clearly erroneous. On the contrary, we find said findings supported by substantial evidence and therefore adopt his findings of fact and

conclusions of law in all respects. Specifically, we find that the petition under Chapter X was not filed in good faith and accordingly dismiss the petition and vacate any stay.

So ordered,

Dated: New York, N. Y.

September 30, 1976

/s/ Lloyd F. MacMahon

LLOYD F. MACMAHON
United States District Judge

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THE JUDGE: The mixed rate.

MR. FRIOU: $110 an hour average. That would be something like $200,000 which I don't want to be in a position here --

THE JUDGE: I understand. I know that I am going beyond the period of the application. I want to get a notion as to the totality as to what the Wisehart fees would be.

MR. WISEHART: Two thousand hours would be six months work normally, maybe a bit over that in our case because of the extra hours that we put in, but I would say that if we each put in two thousand hours a year that would be quite a lot of time with no vacation and no weekend.

MR. FRIOU: May we interrupt Mr. Wisehart. To put Miss Stelter on the stand.

THE JUDGE: Yes.

C H E R Y L R E N E E S T E L T E R,

Called as a witness, having been first duly sworn, was examined and

testified as follows:

EXAMINATION BY THE JUDGE:

Q What is your name?

A Cheryl Renee Stelter.

Q What is your address?

A 339 West 19th Street, New York, New York.

EXAMINATION BY MR. FRIOU:

Q Miss Stelter, were you formerly an employee of REA?

A Yes.

Q Before the bankruptcy?

A Yes.

Q For how many years did you work for REA?

MR. KAHN: I don't mind this. Let's get to the point. I concede that she was an employee and employee of the trustee.

THE JUDGE: It would take a shorter time for his to ask the question.

Q After REA was adjudicated in bankruptcy, did you work for the trustee in bankruptcy?

A Yes.

Q What was your assignment before the

trustee?

A I was to come down here and comprise a list of creditors.

Q Did you come to the court every day?

A Yes.

Q Beginning with when?

A December 15, 1975 from 9 to 5, five days a week.

Q What time did that assignment end?

A July 9, 1976.

Q Was July 9th the last day that you were on the payroll of the trustee?

A Yes.

Q At some later date did someone contact you about doing some further work in the court files?

A Yes.

Q Do you remember who that was?

A That was Mr. Friou.

Q Yes, I believe it was me. What was the work that you were asked to perform at that time?

A Find the claims for the railroads for the

Notes case.

Q What did you do to carry out that assignment?

A I went through the files and looked for them.

Q You came to the courthouse every day and looked for those claims?

A Yes.

Q Miss Stelter, what did you have to do to look for the claims? Would you explain briefly how the claims came in and were registered?

A They came in, the girl would stamp them the date they were received and put in a folder and that is how they were filed. That is how the list was comprised fromthat date.

Q What is the list that you are speaking of?

A The creditors list.

Q Is that a paper called index of claims filed?

A Yes.

Q You have to speak up.

A Okay.

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Q During the time that you were working in the clerk's area of the bankruptcy court --

THE JUDGE: The Clerk's Office.

Q Did you work in Mrs. Minkoff's office?

A Room 230.

THE JUDGE: Is that her office?

THE WITNESS: Yes.

Q That is in the outer area near her office; is that correct?

A Yes.

Q During that time did you in reviewing the claims to determine what claims had been filed in the bankruptcy by the railroads, what procedure did you follow?

A I looked through the files.

Q Did you look at each claim?

A Every claim.

Q In other words, did you look at 29,000 claims?

A Yes.

Q There was no index of claims?

A There was an index made, but the computer

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company unfortunately didn't do such a good job.

Q Did you encounter a problem in the possibility of certain claims not being listed on a computer printout?

A Yes, I did.

Q Would you explain that to the court?

A On -- at the end of March I was told to continue to type the list up until June 8th, but they would no longer be submitted to the computer company.

Q What would no longer be submitted to the computer company?

A These index forms.

Q Who gave you those instructions?

A Edith Minkoff.

Q Have you ever determined how many claims were in the category that were not sent to the computer company?

A Yes.

Q How many in your judgment were not sent?

A About four thousand.

Q Miss Stelter, I show you a letter

from Mr. Noonan to Mr. Wright, dated September 27, 1976, and marked for identification as Court Exhibit 1.

I ask you if you have ever seen this letter before?

A Yes.

Q Have you read this letter?

A Yes.

Q You are familiar with the contents of the letter?

A Yes.

Q Is that letter in your judgment an accurate report?

A Yes.

MR. FRIOU: I offer this letter in evidence as Court Exhibit 1.

MR. KAHN: In evidence with respect to what, to Mr. Wisehart's application for allowance?

If that is all it is offered for, then I have no objection.

MR. FRIOU: This is with reslation to the entire proceeding.

MR. KAHN: Objection.

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THE JUDGE: This proceeding dealing with the application for allowance by the trustee, by your firm and the other three or four parties. That is the proceeding.

MR. FRIOU: This letter is offered at this time in evidence as you indicated, Your Honor, that is without prejudice with relationship to any other proceedings.

THE JUDGE: I will only rule on it with respect to this proceeding.

MR. FRIOU: Yes.

(Court Exhihibit 1 previously marked for identification was now marked Court Exhibit 1 in evidence, as of this date.)

Q Will you explain to the court that you are familiar with the contents of this letter?

A When I came down here to do that job for Mr. Friou and find the claims for the Notes case, I was assisting Mr. Noonan and Mr. Noonan in turn had to type the report of the work that he had done.

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THE JUDGE: In substance what you are saying is that the material that Mr. Noonan was reporting to Mr. Wright was based upon information that you furnished him as a result of your search of the records in this office?

THE WITNESS: Yes.

MR. KAHN: I still have not seen that letter, may I see it?

MR. FRIOU: Yes, we will give you a copy, Mr.Kahn.

MR. KAHN: I want to object to the statement of counsel that this letter has anything whatsoever to do with the railroad claim. It is a leter from Mr. Noonan having to do with the able assistance of Miss Stelter with respect to the proofs of claims.

I think it is inaccurate to say that this relates in any way to the railroad case.

MR. FRIOU: Here is a copy for you, Mr.Kahn..

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THE JUDGE: I gather that the exercise that this young lady was down on was at your request to satisfy a request of your Washington counsel who was to argue the Notes case.

MR. FRIOU: Yes, that piece was argued on September 24th before a three-judge court in this circuit. Inthat connection because of the intervening bankruptcy since the inception of the case it became relevant to know whether the creditorswho were being sued in the Notes case and the Notes which REA claimed were void, whether those notes, those claims had been filed on the basis of those notes.

In order to answer that question it was necessary for Miss Stelter and Mr. Noonan to perform considerable service.

THE JUDGE: She examined 29,000 claims filed by the railroads in conjunction the Notes case.

MR. FRIOU: Yes, Your Honor, she

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did.

Q Miss Stelter, did you find claims filed by the railroads?

A Yes, I think there were about 43 of them or something like that.

Q Was the amount $40 million or between $35 million and $40 million worth of claims?

A I would say that is about accurate.

Q There is in existence a detailed report, is there not, concerning the results of your work and specifically dealing with the railroad claims?

A Yes, there is.

Q As far as you know was that report given to Mr. Wright?

A Yes.

Q Did you examine it before it was given to Mr. Wright?

A Yes, I read it.

Q MR. PRIOU: I have nothing further at this time.

EXAMINATION BY MR. KAHN:

Q Miss Stelter, has the trustee or

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anyone inthe trustee's office or any counsel for the trustee ever told you or instructed you not to send proofs of claim filed in court to the computer company?

A No.

Q Has anybody in the bankruptcy clerk's office advised you not to send proofs of claim?

A Yes.

Q List all of the people who told you not to send proofs of claim.

A The only person who told me was Edith Minkoff and I was further advised by Iris Bragin -- not advised, but reminded not to submit them any longer.

Q Do you know whether or not anybody in the entire bankruptcy clerk's office submitted claims to the computer company other than you?

A No one did.

Q How do you know that?

A Because I spoke with Mr. Rice. I am under the impression he is the president of the processing company that was receiving these lists.

THE JUDGE: Mr. Wright?

THE WITNESS: Rice.

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THE JUDGE: R-i-c-e?

THE WITNESS: Yes.

Q What did he say to you?

A He told me that he had not received them.

Q In what connection did he say that he did not receive them? What was them?

A Those additional 4,000 claims.

Q Do you know whether any of these so called 4,000 additional claims would be duplications or supplements of any earlier claims filed?

A They could be.

Q They could be?

A Yes.

Q You do not know that?

A No.

MR. KAHN: I have no further questions, Your Honor.

EXAMINATION BY MR. FRIOU:

Q Miss Stelter, --

THE JUDGE: Counsel, may I suggest that you inquire of this witness, the totality of the conversation with Mrs. Minkoff and with Iris, where and when.

BY MR. KAHN:

Q Do you understand the question?

A Not really.

Q Would you tell us every conversation which you remember having with Mrs. Minkoff about this subject?

THE JUDGE: About the 4,000 odd claims.

Q About the 4,000 odd claims. Could you recall when those conversations took place? What you said and what she said?

A At the end of August when I was working, finding the railroad claims for the Notes case, Mr. Noonan questioned me as to why they were not submitted and I told him that there was a cutoff date and in turn he told me to speak to Edith and find out why she cut them off.

At that time Edith told me that it was too expensive and the trustee didn't want to spend the money for it any more.

Q What was too expensive?

A To submit them to the computer company and have it run off.

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Q So you only had then one conversation with Mrs. Minkoff on this subject and that is the one that you have just related?

A I have had quite a few with Mrs. Minkoff in relation to the claims work. That is all I really remember in reference to that.

Q How about your conversation with Iris?

A That was back in March when I was advised to no longer submit them and at that time I spoke to Mrs. Minkoff and she was too busy and in turn I asked her supervisor Iris and she told me that there had to be a cutoff date which was further -- later on I spoke to Mrs. Minkoff about that and she told me there had to be a cutoff date at that time.

Iris told me there was to be a cutoff date and from that point on I would just attach them.

Q What was the cutoff date?

A On or about March 23rd.

Q Did you call Mr. Rice or did he call you?

A I had called Mr. Rice to find out -- to

verify whether there would be a new computer run as promised.

Q About when was that telephone conversation?

A At the end of August.

Q When you say a new computer run, what was the date of the old computer run?

A It was one date in April and then one after that.

THE JUDGE: What year?

THE WITNESS: April of 1976.

Then there was one date May of 1976 which was an update of April's. He advised me that there would be a further update which would be in August.

Q He advised you that by August the computer run would be updated to include up to August?

A No. No. It would be updating and when I questioned him, what he meant by update, were there further claims submitted, and he said, no, that there were claims being crossed off for incorrect addresses as they sent out some notices which came

back as addressee unknown, they were erased from the computer list.

Q He said nothing about adding any claims to the computer list which he already then had; is that correct?

A He said definitely not, no additions.

Q Was there any mention made as to whether or not we were talking about claims filed for periods existing prior to and subsequent to February 18, 1976?

A No.

MR. KAHN: I have no further questions.

EXAMINATION BY MR. FRIOU:

Q We covered this. On whose instructions were you told to discontinue sending the name with the forms for the computer company?

A Edith and Iris.

Q Can you identify in the files of the bankruptcy court the file folders or containers which have the names of creditors, the claims of creditors, the names and addresses of whom were not sent?

A Yes.

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Q How would you do that?

A They are on the shelf.

Q Do you know where they are located?

A Yes.

MR. FRIOU: Would it be helpful to the court if she were to bring in here a sample of those claims?

MR. KAHN: Objection, Your Honor.

THE JUDGE: What is the ground?

MR. KAHN: The ground is that by bringing in a physical folder full of claims is not proof that those claims were sent or were not sent.

It is very dramatic but of no probative force at all.

THE JUDGE: Let's change the question. Did you segregate the 4,000 claims that you claimed were not on the register that you were comparing?

THE WITNESS: They are on the shelf with the list attached. There are twenty-five names on a sheet and for each claim listed it is attached.

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MR. WISEHART: Are they separate?

THE WITNESS: Yes.

MR. FRIOU: You did not segregate them, did you?

THE WITNESS: I had to keep them that way.

Q Did yous egregate them from the claims that were sent?

A Yes.

THE JUDGE: I am instructing the witness to seek out Mrs. Minkoff and identify the 4,173 names and addresses of claims that you claim were omitted and I will adjourn this hearing and we will fix another date.

(Fourteen folders marked Court Exhibit 2 for identification, as of this date.)

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I N D E X

WITNESS

Edith Minkoff

Arthur Wisehart

Cheryl Renee Stelter

COURT EXHIBITS

		ID	EV
1	Document dated September 27,1976	16	71
2	Fourteen folders containing 4,173 claims.	82	

- - -

100; Charge

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter	Bankruptcy Numbers
-of-	
REA HOLDING CORPORATION,	75 B 251
THE EXPRESS COMPANY, INC.,	75 B 252
REA EXPRESS, INC., f/k/a Railway Express Agency, Inc.,	75 B 253
REXCO SUPPLY CORPORATION,	75 B 254
Bankrupts.	MEMORANDUM OPINION

JOHN J. GALGAY - Bankruptcy Judge

Notice to creditors under the Bankruptcy Act is governed by Rule 203. That rule provides that the "court shall give all creditors at least 10 days' notice by mail of ...(6) ... an application for compensation or reimbursement of expenses filed by a receiver, marshal, trustee, attorney, or accountant,.."

In the present situation notice of an application on allowances was given by mail to approximately 25,000 creditors , but not to approximately 4,100 creditors. At this time it is uncertain as to why these additional notices were not properly forwarded so as to be included in the original mailing. None of the 25,000 creditors who were apprised of the application have appeared in any respect on this matter. However, to insure that the unnotified creditors are given the opportunity of information as to this aspect of this case, the court concludes that it will adjourn this matter for 30 days, November 16, 1976 at 11:00.

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The clerk of the Bankruptcy Court is directed to furnish to the approximately 4, 100 creditors an amended notice in the form of the original notice and reflecting the adjourned date. Notwithstanding that none of the notified 25,000 creditors have appeared, counsel is directed to publish notice reflecting the adjourned date fixed by this decision in the Daily News Record.

Dated: New York, New York
October 15, 1976

It is so Ordered.

Isaac I. Gallgay
Bankruptcy Judge

INTERSTATE COMMERCE COMMISSION

SERVICE DATE

NOV 19 1976

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No. MC-C-8862 1/

BRADA MILLER FREIGHT SYSTEM, INC., v. REXCO, INC. AND REA EXPRESS, INC.

Decided November 17, 1976

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1. In the complaint proceedings, defendant found to be engaged in described operations beyond the specific scope of its certificates and its temporary authority. Cease and desist order entered.

2. In the petition proceedings, the permanent application found not to have been appropriately prosecuted and good cause found for termination of the temporary authority, and the permanent application dismissed and the temporary authority revoked.

John W. Bryant, Wallace N. Nations, Todd A. Peterman, Gary W. Sawyer, Richard H. Streeter, and Daniel C. Sullivan for complainants, petitioners, and intervenors in support of the complainants and petitioners.

John M. Cleary, John K. Maser III, and Donald L. Wallace for the defendant-applicant.

Bernard A. Gould and Michael N. Nafpliotis, for the Bureau of Enforcement, Interstate Commerce Commission

J. William Cain, Jr., and Robert R. Redmond for intervener in opposition to relief requested.

REPORT AND ORDER OF THE COMMISSION

BY THE COMMISSION:

Due and timely execution of our functions under section 17 of the Interstate Commerce Act imperatively requires the omission of the Administrative Law Judge's initial decision. Requested findings not discussed in this report nor reflected in our findings have been considered and found not justified or their resolution not necessary for the appropriate disposition of these proceedings.

1/ This decision also embraces No. MC-C-8864 Schneider Transport, Inc. v. REA Express, Inc., No. MC-C-8867 American Trucking Associations, Inc. v. REA Express, Inc., No. MC-C-8874 Associated Truck Lines, Inc., et al v. REA Express, Inc., No. MC-66562 (Sub-No. 2345) (Part No. 181), REA Express, Inc. - Petition of American Trucking Associations, Inc., for Dismissal of Application, and No. MC-66562 (Sub-No. 2308 TA), REA Express, Inc. - Petition of American Trucking Associations, Inc., for Cancellation of Temporary Authority.

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By separate complaints filed November 25, 1975, November 26, 1975, December 5, 1975, and December 11, 1975, respectively, Brada Miller Freight System, Inc.; Schneider Transport, Inc.; American Trucking Associations, Inc.,; and Associated Truck Lines, Inc., et al.,2/ seek a cease and desist order against alleged unlawful operations of REA Express, Inc. In addition, by petition filed December 1, 1975, the American Trucking Associations, Inc. seeks dismissal of the application designated as MC-66562 (Sub-No. 2314) and for cancellation of MC-66562 (Sub-No. 2308TA).

By order of April 5, 1976, these proceedings were designated for handling on a consolidated basis and certain provisions for discovery were made. By order of April 14, 1976, the Bureau of Enforcement of this Commission was directed to participate in the complainant proceedings for the purpose of developing the record. By order of July 28, 1976, the Commission prescribed special rules for the submission of evidence and referred the matter to an Administrative Law Judge for hearing. Appropriate statements were filed by the complainants and petitioners (hereinafter generally referred to as complainants), one week prior to the start of the hearing and hearing was held on a consolidated record at Washington, D.C., commencing on August 30, 1976, and extending through September 22, 1976. At the hearing, Alltrans Express, USA, Inc., was allowed to intervene in opposition to the relief requested. At the close of the hearing October 18, 1976, was set as the brief date. Also, a filing date of October 25, 1976, was established for the submission of reply briefs. By notice served October 15, 1976, the Commission announced that it would expedite the processing of these proceedings by dispensing with the Administrative Law Judge's initial decision and by issuing a report of the Commission. Briefs and reply briefs were timely filed by all parties. The record has duly been certified to the Commission by the Administrative Law Judge with the observation that: "The statements and demeanor of all witnesses testifying at the hearing did not demonstrate any instance which would subject the credibility of such witness to question."

CONTENTIONS OF THE PARTIES IN POST-HEARING BRIEFS

INITIAL BRIEFS:

Complainants maintain that the defendant has willfully and otherwise breached its obligation to render a service which is validly consistent and reasonably commensurate with the scope of its express service authority. They contend, for example, that through tariff restrictions, REA's Rexco division does not hold itself out to transport either commodities requiring special care in handling or lighter-weight shipments, both of which services are basic indicia of express

2/ Other specific complainants or interveners represented at the hearing were: Allegheny Corporation doing business as Jones Motor; Artim Transportation System, Inc.; Associated Transport, Inc.; B&P Motor Express, Inc.; Eastern Express, Inc.; George Transfer and Rigging Company; Great Lakes Express Company; Holland Motor Express, Inc.; Home Transportation Company, Inc.; Interstate Motor Freight System; Jones Transfer Company; Kaplan Trucking Company; Long Transportation Company; McLean Trucking Company; Ryder Truck Lines, Inc.; Earl C. Smith, Inc.; Strickland Transportation Company, Inc.; United Trucking Service, Inc.; and U.S. Truck Company, Inc.,Consolidated Freightways Corporation, a protestant in the original sub 2345 proceeding, also made an appearance at the hearing.

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service. Complainants contend that, on the other hand, Rexco actively solicits traffic which is not susceptible to transportation in van-type trailer equipment and that it provides call-on-demand and irregular-route services all of which are beyond the scope of the express service authority pursuant to which Rexco conducts its operations. Moreover, complainants allege that Rexco violates its published tariffs and governing publications by regularly performing stop-in-transit service and by its failure to issue uniform express receipts or uniform express bills of lading. Complainants and petitioners also set forth data to demonstrate that Rexco's published rates are equivalent to those of general freight carriers instead of being set at premium levels (which express service authority demands). Complainants also attribute other unlawful activities to the Rexco operations. They contend that Rexco's procedures for employing the services and equipment of owner-operators on a trip-lease basis are violative of this Commission's rules governing such transactions in Lease and Interchange of Vehicles, 49 CFR 1057.1 et seq., in that the duration of the Rexco trip-lease agreements are not of sufficient (30-day minimum) duration and because of a lack of proper inspection of the motor vehicle equipment utilized pursuant to those agreements. Moreover, based on data contained in shipment manifests obtained in discovery herein, complainants contend the services performed by Rexco drivers, are, in numerous instances, violative of hours-of-service rules of the Department of Transportation.

In conclusion, complainants argue that "all" outstanding temporary authorities issued to defendant, especially those in No. MC 66562 (Sub-No. 2308 TA), the so-called "hub" temporary authority, should be revoked and all corresponding permanent authority applications, especially that in No. MC-66562 (Sub-No. 2345)(Part No. 181), the so-called "hub" permanent authority application, should be dismissed because of the failure of defendants to render a continuous and adequate service with respect to the former, and to maintain active prosecution of the latter.

Generally speaking, the Bureau of Enforcement contends that the transportation service being performed by the Rexco Division is not express service and therefore Rexco is operating beyond the scope of the REA authority which is limited to the performance of transportation in express service. More specifically, the Bureau argues that in many instances shipments handled by Rexco (1) are not transported pursuant to established schedules, (2) do not move over specified or, in some instances, authorized routes, and (3) involve unnecessary interruptions, all of which is inconsistent with this Commission's description of express service. Moreover, the Bureau argues that Rexco's published tariffs exclude the carriage of smaller weight shipments and certain commodities requiring special care in handling. Furthermore, it contends that Rexco's emphasis on the solicitation of traffic which is not susceptible to transportation in van-type trailer equipment, effectively restricts the access of the shipping public to Rexco's services to an extent contrary to Rexco's duty to render express service. In conclusion, the Bureau contends that the failure of defendants to provide any but a small portion of the service authorized in REA's operating authority, for this reason alone, results in operations which cannot be characterized as express service.

As a general proposition, defendant contends that by seeking the relief requested in this proceeding, complainants and petitioners have abused the processes of this Commission in a concerted effort to eliminate the competition of the defendant and the potential competition of the nationwide express service which intervenor Alltrans plans to

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provide. As another general proposition, defendants maintain that the Rexco operations are the only REA operations which are the subject of this proceeding; and that the Rexco operations must be viewed as a small part of REA service and, further, as an attempt on the part of REA's trustee in bankruptcy to protect and preserve the operating rights of the bankrupt REA Express, Inc. Defendant argues that the complainants have failed to meet their respective burdens of proving that the Rexco operations have deviated and are continuing to deviate from the express service defendant is obligated to provide. Moreover, defendant contends that Rexco's truckload service and its policy of transporting any and all commodities regardless of whether they move in ordinary van-trailer equipment are proper and that as an express carrier it is exempt from the Lease and Interchange of Vehicle rules under 49 CFR section 1057.3(b). Furthermore, defendants argue that inasmuch as compliance was made with each Commission order in the hub permanent authority application proceeding and, inasmuch as the Commission has never set a date for oral hearing in that proceeding, the hub permanent authority application cannot be dismissed for want of prosecution and the corresponding hub temporary authority cannot be cancelled. Additionally, defendants argue that because intervenor in opposition Alltrans has contracted with REA's trustee in bankruptcy, subject to Commission approval, to operate the outstanding authorities of REA and to be substituted as applicant in REA's permanent authority applications, there can be no doubt of the bona fide intention to prosecute the permanent authority hub application. Defendants contend that should the Commission dismiss the permanent authority hub application and cancel the hub temporary authority notwithstanding the foregoing contentions, this action will deprive the shipping public of the resumption of a nationwide express service of the type historically provided by REA.

Alltrans Express U.S.A., Inc., intervenor in opposition to the involved complaints and petitions filed, on September 27, 1976, applications docketed in No. MC-F-13003 and No. MC-99388 (Sub-No. 11), relating to its planned purchase of the defendant's operating rights. It contends that cancellation of REA's hub temporary authority is wholly dependent upon the dismissal of the corresponding permanent authority hub application because of this Commission's order extending the hub temporary authority for a period pending the outcome of the corresponding permanent authority application. Furthermore, Alltrans argues that the record herein demonstrates no failure on the part of REA to prosecute said permanent authority application but rather, as Alltrans alleges, a failure on the part of this Commission to set a date for oral hearing in the permanent authority hub application proceeding which has resulted in the delay in prosecution of that application. Alltrans further contends that complainants have not demonstrated that the present operations by Rexco are violative of REA's express service authority in that the evidence adduced by complainants and petitioners in this regard consists of testimony of witnesses who were formerly employed by REA several years ago and who therefore are not competent to testify as to current Rexco operations. Moreover, as to Rexco's allegedly unlawful rate levels and tariff restrictions, Alltrans argues that there is no requirement for the assessment of premium rates or prohibition against the trasnportation of truckload shipments by motor carriers operating pursuant to express service authority. Furthermore, as to instances of delay or unreasonable interruptions in the services of Rexco alleged by the Bureau of Enforcement, Alltrans maintains that such instances were isolated and infrequent relative to Rexco's overall operations. In short, Alltrans contends that the record herein does not demonstrate that Rexco has been rendering a service in any significant way inconsistent with the

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express service authority under which REA formerly operated. Alltrans submits that it has made an agreement with defendant REA's Trustee in Bankruptcy which is subject to the approval of this Commission in a finance proceeding in No. MC-F-13003 to operate temporarily all authorities of REA under section 210(a)(b) of the Interstate Commerce Act, to prosecute all pending REA motor carrier authority applications, and to purchase all existing REA operating authority. Alltrans states that it will provide a "full-spectrum" service to the extent of the REA authorities. Consequently, it argues that substantially all of the issues in the instant proceeding will be moot should it prevail in the above-noted finance proceeding.

REPLY BRIEFS:

Complainants reply that their actions herein are directed at the alleged unlawful operations of REA through its Rexco Division and do not constitute a concerted, anticompetitive assault on the bona fide express operations conducted by REA. In this regard, complainants state that Rexco's operations are indistinguishable from, and thus directly competitive with, the services of general freight carriers which, for the most part, complainants represent. Consequently, complainants contend that their rights of action in this proceeding are valid and moreover that they are entitled to relief sought by them herein from the alleged unlawful operations of Rexco which are damaging their operations and the operations of those which they represent. Complainants contend further that contrary to any inaction on the part of the Commission as alleged by defendants and intervenor in opposition, it is REA's express repudiation of the operational feasibility of the "hub" concept in various Commission proceedings subsequent to the filing of the hub permanent and temporary authority applications which has created the undue delay in prosecution of the hub application for permanent authority. Further, complainants argue that any such delay atrributable to this Commission, under the circumstances involved, does not to any degree relieve REA of its duty under Rule 247(f) of the Commission's Special Rules of Practice [49 CFR 1100.247(f)] for timely prosecution of the hub application. Thus, complainant contends that the hub application for permanent authority must be dismissed and the corresponding hub temporary authority must be cancelled. Finally, complainants contend that a potential substitution of Alltrans as applicant in the hub application for permanent authority and as operator under the corresponding hub temporary authority should not be allowed to prevent dismissal of the former or cancellation or revocation of the latter, owing to the fact that REA has admitted to the unworkable nature of the hub concept relative to its nistoric nationwide express service and because the stated intentions of Alltrans to institute a "full-spectrum" express service pursuant to the hub application cannot neutralize these admissions as to the lack of operational feasibility of the hub application service proposal.

The Bureau replies that, contrary to assertions by the defendant, the range of commodities transported in the service performed by Rexco is inconsistent with express service in that Rexco provides transportation for any commodity which may "conceivably" be carried in van-type trailer equipment rather than those commodities which could "safely" be carried in such equipment. Otherwise, it reasserts the contentions made in its initial post-hearing brief.

Defendant replies that Rexco's operations reflect an attempt by REA to offer service under its operating authorities to the extent possible, albeit to a small extent relative to the past nationwide

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REA operations, within the context of REA's bankruptcy. They contend further that because Alltrans is seeking to revitalize REA's nationwide general express services, for this Commission to cancel the operating rights of REA and to dismiss the REA applications for permanent authority as complainants request on the basis of the operations of REA's Rexco Division, would result in a penalty far outstripping the wrongs, if there be any, committed by REA through its Rexco Division and would work to the severe detriment of the shipping public by depriving it of the nationwide express service to be provided by Alltrans.

Alltrans replies that complainants request for dismissal of all temporary authorities issued to REA, based on the alleged willful and wanton violations by defendants of their express service obligations is beyond the legitimate scope of this proceeding. It asserts that such action on the part of this Commission, based on the record in this proceeding, would constitute a breach of due process. Nevertheless, based on what it purports to be the abstract nature of the term "express service" and the overall record herein, Alltrans contends that complainants have not maintained their burden of proving the existence, much less the willfulness of such violations on the part of defendants.

PRELIMINARY MATTERS

On brief, complainants renew their objection to the Administrative Law Judge's ruling that a number of complainant carriers would not be allowed to testify because their testimony would be cumulative and because prepared statements giving the exact nature of their testimony had been submitted prior to the start of the hearing. Rule 76 of the Commission's General Rules of Practice, 49 CFR 1100.76 notes the duty of the hearing officer to limit the number of witnesses whose testimony may be merely cumulative. The ruling that the noted material would be cumulative was made after testimony and cross-examination of several complainant carriers had been allowed and, under these circumstances, the ruling was a proper exercise of the Administrative Law Judge's function. See NLRB v. Donnelly Garment Co., 330 U.S. 219, (1947).

Complainants also object to the receipt, as "facts", of several exhibits presented by the defendant. These exhibits, identified by defendant as "Admissions and/or Stipulations of Fact" are quotations of findings regarding REA that were made in prior, identified decisions of this Commission. They are not excerpts taken only from the records of those proceedings and they do not relate to matters (such as proof of public need), which possibly could be refuted by cross-examination. The quoted findings pertain to the historical functions of REA as related by this Commission and we conclude that this properly may be received and considered in this proceeding. Compare Coastal Tank Lines, Inc., Ext. - W.Va., 108 M.C.C. 190, at 194, and cases cited therein. In a similar vein, we also will take notice of our findings in other cases cited below as well as statements of the Commission made in its annual reports to Congress. See Santa Fe Trail Transp. Co. Ext. - Colo. & Kans. Points, 111 M.C.C. 224, at 227. Accordingly, we consider that the so-called "Admissions" were properly received.

Although a number of other objections were made during the course of the hearing by several of the parties, these objections have not been pressed in brief and will be considered as waived. See Rule 87 of our General Rules of Practice.

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Intervenor Alltrans has filed a motion to strike complainants' brief or, alternatively, certain portions of that brief. Complainants have filed a reply. The intervenor's motion will be, and it is hereby denied. Clearly, complainants' overall brief is in conformance with our General Rules of Practice. Complainants' comments pertaining to a request that "all" of REA's Temporary Authority be revoked and their comments relative to leasing regulations and REA's fitness may be considered to be material, especially to the Commission's awareness of factors related to the embraced petition proceedings and our duty to know the status of carriers we are required to regulate. The intervenor also asks that testimony of record relative to safety be stricken. The latter request relates to prior objections made at the hearing and not renewed by intervenor on its brief and, as noted above, such request must be considered as having been waived.

HISTORY AND BACKGROUND

In order properly to understand and evaluate the matters involved herein, it is necessary to be aware of the nature of REA's authority, the more recent history of its pre-bankrupt operation, and its post-bankruptcy activities.

Its earlier history has been concisely summarized in our report in REA Express, Inc., Application For ETA, 117 M.C.C. 80 (1971) at pages 81 through 86, a decision which denied a preliminary attempt by REA to restructure further its operations into an irregular route express service. This report also contains a concise description of the so-called "Hub System" which is the subject of the embraced petition proceedings herein, the pending permanent application filed in 1968, and the temporary authority (granted in June of 1968), to operate under the "Hub System". As we stated in that report at pages 84 and 86:

> The "Hub" system sought by REA essentially consists of 24 major points for the dispatch and receipt of small shipment traffic which, according to REA, generally follow the production areas outlined by the Bureau of the Census. Each "Hub" is connected with each of the others by a motor or rail line-haul route, or a combination of both. Each of the "Hubs" assertedly would serve an area containing satellite points to be served in all-motor operations. To implement this system, REA filed the largest single application in the history of this Commission, which application outlined each route and segment proposed to be utilized (without any rail-haul restrictions) in the performance of the "Hub" service.
>
> ***
>
> Having operated in the Hub configuration for approximately 3 years, REA's new management has recently proposed another complete restructuring of the carrier's operations. To this end, it initially sought temporary authority, based upon the same type of allegations used to support the "Hub" system, to perform nationwide irregular-route service in the transportation of general commodities, moving in express service. That application was denied by order of this Commission served August 9, 1971, for the reasons that

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(1) REA had failed to demonstrate an immediate and urgent need for the institution of the proposed service (2) "irregular route" service would be inconsistent with express service, (3) REA had failed to establish that irregular-route service would be either operationally or economically feasible, and (4) REA had failed to establish that the requested authority would solve any of the carrier's asserted operational problems.

Clearly, this Commission has been sympathetic to the various requests of REA's management concerning its operational and rate structuring, in the belief that the carrier's management had presented the most effective, and perhaps the only pattern of service which would keep REA viable. Despite permitting REA such wide latitude, REA is still in perilous financial straits, and, by its own admission, is conducting an uneconomical, loss-producing operation.

We went on to state at pages 88 and 89 that:

. . . The basic indicia of express service have been set forth in previous Commission reports. 3/ One index of express service is that the carrier must perform actual operations between all authorized points upon firmly established schedules allowing minimum practicable highway transit time and providing fixed delivery times which are available to actual and potential shippers at authorized origins which in practice are not changed, except after substantial notice to the general public. In essence, this means that express service, whatever else it may be, must be performed as an expedited, regular-route service. Such service is operationally inconsistent with irregular-route service which, in the usual concept, envisions a "call-on-demand," unscheduled operation. This same issue arose in the Nashua case and, beginning at page 322, it was discussed at some length. Thus, REA has been well advised that its basic proposal contains inconsistent terms and yet we still have not been presented with a rationalization for the inconsistency or any reason for this Commission to modify its previous standard of express service.

If REA is to forego completely its regular-route operations, it well may be that it will evolve into no more than an ordinary motor common carrier of small shipments, and cease to exist as an express company. Should this be the case, REA, as a motor common carrier, could not avail itself of express company terminal areas, but would be limited to those permitted carriers of its new status. The effect of this upon REA's operations cannot be determined upon the record before us.

3/ Transportation Activities of Arrowhead Freight Lines 63 M.C.C. 573, 581 (1955).

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Several portions of prior decisions, cited in the REA case, are of special significance. In Railway Express Agency, Inc., Extension - Nashua, N. H., 91 M.C.C. 311, 324 (1962), we stated:

> . . . this Commission has always intended the term "express service" to mean generally the expedited handling of small-parcel traffic which common carriers of ordinary freight do not desire usually or are not able to perform. It is a service superior to that rendered as a rule by common carriers of general freight, and thus requires the payment of premium charges.
>
> From this view it follows that "express service" is not susceptible of precise definition because it is, by its very nature, a service whose attributes of expediency, premium rates, and special handling of freight must be judged in comparison with the services and rates provided and assessed usually by common carriers of ordinary freight.

And, in the earlier report in Transportation Activities of Arrowhead Freight Lines, 63 M.C.C. 573, at 581 (1955), the Commission discussed the basic criteria of a bona fide express service as follows:

> Summary.--Succinctly stated the rendition of a bona-fide express service by property carriers with authority to transport general commodities requires such carriers (1) to provide a bona fide holding out together with the ability to transport any commodity which may be safely transported in ordinary van-type equipment, including those requiring a maximum degree of care or security or both, (2) to provide such care or security or both as the inherent characteristics of the commodities making up the shipment which are accepted may require, (3) to provide equally expeditious transportation and careful handling for all accepted shipments, regardless of their volume, special demands, or value, from the point of pickup to the point of delivery, (4) to perform actual operations between all authorized points upon firmly established schedules allowing minimum practicable highway transit time and providing fixed delivery times which are available to actual and potential shippers at authorized origins and which in practice are not changed except after substantial notice to the general public, and (5) to use relatively simple billing, rate structures, and rate publications whereby the rates and charges for the services offered and performed may easily be determined with a minimum of delay.

Since the filing of the "Hub System" application in 1968, and the attendant approval of temporary authority, the Commission con-

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sistently has been aware of and concerned with the status and operations of REA.

We believe that a recognition of such awareness should be reflected in this decision and, in order to do so, we believe it appropriate to take official notice of statements of the Commission made in our 86th (1972) through 89th (1975) Annual Report of the Interstate Commerce Commission, and to quote the following excerpts from these reports:

86th Report (1972) at pages 53 and 54:

> The relative importance of REA Express, Inc. (REA), as a major common carrier of intercity small shipments has declined continually since World War II. For example, in 1946 REA handled 235 million surface shipments, but by 1971 its traffic had declined 94 percent. As a result of this precipitous descent, REA's surface shipments account for less than 1 percent of the tonnage of estimated total regulated intercity small shipment traffic. Service contractions and continued rate increases appear to be the major contributors to this steady decline in business.
>
> Air express traffic has become an increasingly significant part of REA's service, accounting for about one-third of its total business. Even so, its air express tonnage is less than in 1965.
>
> Notwithstanding some improvement in the general economy in fiscal 1972, indications are that REA's general decline has not been arrested. Barring a dramatic upturn in business, REA's outlook for the immediate future is rather bleak.
>
> Although REA's loss in traffic is apparently being absorbed by major regulated competitors (motor carriers, bus express, United Parcel Service, small package carriers, and to some extent, by private shipper associations) total elimination of REA's service probably would cause inconvenience to shippers in the distribution of such items as perishables, live animals and birds, and other special items.
>
> This Commission is extremely concerned with the future prospects of REA Express, Inc., the Nation's largest express carrier. In No. MC-66562, REA Express, Inc., Application for Emergency Temporary Authority, 117 M.C.C. 80, however, we were unable to approve REA's

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six-volume application for 30 days' emergency irregular-route temporary authority, because REA failed to set forth (1) any reasonable manner in which it could or would perform virtually nationwide irregular-route service, (2) the manner in which "express" service could be performed on a nonscheduled basis or over anything but regular routes, and (3) the nature of the purported "new financing" which it expected to become available as a result of such a grant of temporary authority.

87th Report (1973) at page 46:

> Once one of the nation's premier intercity common carriers of parcel-size shipments, REA Express, Inc. (REA) has fallen upon difficult times as the volume of freight it has carried -- especially over surface routes -- has continued to decline. In 1965, REA handled 1.8 million tons of surface shipments. By 1972, its volume had declined over 68 percent. Managerial disruptions, changing national distribution patterns, service contractions, labor disputes, increased competition, and severe financial difficulties appear to be the principal contributors to the decline in REA's business.
>
> Even air express tonnage, although it increased by approximately 5.4 percent in calendar 1972 over 1971, is still less than that recorded in 1965. While air express tonnage rose, the number of air express shipments declined by 4.3 percent during the 1971-72 period.
>
> As noted in our 86th Annual Report, the long term outlook for REA is not auspicious.

88th Report (1974) at pages 54 and 55:

> In regard to surface transportation authority, REA retains its temporary authority, issued in 1968 by this Commission pursuant to section 210a(a) of the Interstate Commerce Act, to operate its "Hub System." The system essentially consists of 24 major points for dispatch and receipt of small shipment traffic. Each hub is connected with the others by a motor or rail route, or combination of both. Each hub assertedly is designed for an area containing satellite points to be served in all-motor operations. The concept proved to be inefficient, necessitating considerable exceptions to the basic operating plans.

Although the system today bears little resemblance to the original concept, the company's operations are based almost entirely upon the temporary authority in the hub application.

Surface express traffic has continued to decline but at a more moderate rate than that experienced by the company in the 1960's. REA surface traffic dropped sharply from 57.7 million shipments in calendar 1965 to 19.3 million in calendar 1970. Correspondingly during the same period, revenues declined from $350 to 267.2 million. However, surface traffic has stabilized somewhat during the past few years. Surface traffic volume in calendar 1971 amounted to 14.5 million shipments, 10.8 million in calendar 1972, and 10.4 million in 1973. Revenues dropped from $172.7 million in calendar 1971 to $148.6 million in calendar 1972 but recovered $161.2 million in 1973. Preliminary estimates indicate that this trend will hold for fiscal 1974.

Preliminary traffic and revenue estimates indicate REA's financial position has improved slightly for fiscal 1974, primarily attributable to a 10-percent rate increase on surface transportation effective March 14, 1974. Whether REA has the capability to continue as a viable transportation entity in light of the CAB order remains to be seen.

89th Report (1975) at pages 48 and 49:

REA Express, Inc. (REA) continued to experience operating and financial difficulties, forcing the company on Feb. 18, 1975, to file for reorganization under Chapter XI of the Bankruptcy Act, Chapter XI allows REA to continue operations while developing workable plans to improve its financial posture thus enabling it to pay off its creditors, principally the airlines, railroads, and banks.

While all debts or claims incurred prior to February 18, 1975, are temporarily frozen, the Commission's insurance requirements protect the shipping public for loss and damage claims. All such claimants will receive payment in full, up to our $2,500 per claim minimum requirements, by the insurance company which made our statutory security filing. Arrangements have been completed for all cargo claimants to be advised of this protection, furnished the name of the insurance company, and how to file their claims.

Such loss and damage claims are being processed and paid with the total payment expected to be approximately $3,000,000. Without this protection, cargo claimants would be required to award (sic)[await] the ultimate resolution of the reorganization proceeding and whatever percentage of payment is decreed.

The pressure of the December 1974 Civil Aeronautics Board ruling which threatened the existence of REA's air express operation, accounting for 62 percent of the company's revenues in 1974, was lessened somewhat by a Federal court ruling which stayed the effectiveness of the CAB order and subsequently remanded the decision to the CAB for further action.

Nevertheless, the CAB views on the need for the type of air express services provided by REA, which led to the Board's decision to terminate domestic air express, still continues to be of prime concern to the company. In April 1974, the Board disapproved an air express agreement negotiated between REA and 22 airlines. Although subject to review by a Federal appeals court, such CAB actions will no doubt be a major determinant in the company's reorganization plans and operational programs.

The CAB has ordered the scheduled airlines to develop operational programs to provide priority air service to replace their agreement with REA.

A statistical profile of REA's traffic shows a marked decrease in the company's air express traffic and revenues. The air volume decreased from 98 thousand tons in 1973 to 86.2 thousand tons in 1974; the number of shipments declined from 6.54 million in 1973 to 4.81 million in 1974; and revenues dropped from $107.4 to $103.2 million for the same period.

Air express volume was down considerably in the first quarter 1974, which probably reflects the uncertainty on the part of the shipping public as to the ability of the company to retain its priority status with the airlines in domestic air express operations.

While its surface traffic volume declined from 713 thousand tons in 1973 to 676.6 thousand tons in 1974, and the number of shipments dropped from 9.99 million to 8.96 million for the period, revenues from its surface traffic rose from $154.5 million in 1973 to $165.8 million in 1974.

Essentially, the company's financial problem is a shortage of cash, although it did manage an operating profit of about $3 million in 1974, compared to a deficit of approximately $8.5 million

> in 1973. Its present critical cash position has been attributed by company officials to the general state of the economy, the inability to obtain bank credit and Federal government aid, and the recession in the auto and textile industries -- two of REA's biggest customers.
>
> The Commission's principal action which may affect REA was taken in a report and order served December 20, 1974, United Parcel Service, Inc., Extension -- 48 States, 120 M.C.C. 747. By this order, the Commission's Division 1 granted an extension of the Company's common carrier authority to bring UPS service to all of the 48 contiguous States.
>
> In an effort to survive, REA has realigned its rate structure to be more competitive with forwarder service. REA's planned marketing strategy has been to concentrate on expanding its air express operations, initiating a reorganization plan to tighten control over its trucking operation, and consolidating its surface operations.

During the later years when REA was seeking to restructure its operations for the sake of survival, the Commission, in Chemicals in Aggregate Shipments - Midland, Mich., To East, 335 I.C.C. 20 (1969), approved REA's reduced truckload commodity rates on chemicals where the service otherwise fully satisfied the criteria of Arrowhead, supra. REA also is shown to have participated in certain truckload movements of cosmetics between Chicago, Ill., and Atlanta, Ga., and of bakery items from Pittsburgh to eastern locations. Certain other truckload rates were published by REA, however, it appears that none of these were based upon a mileage scale with general applicability. It also is noted that in another temporary authority application in Sub-No. 2337TA*, a pleading by REA dated June 11, 1971, specifically advised the Commission as follows:

> /F/ or REA to pursue to conclusion the permanent application in the Hub case would do the Commission, the public and REA a considerable disservice. For experience demonstrates that the Hub authority precludes REA from providing to the public a modern, efficient and economical express service. The present and future of

*In Docket No. 66562 (Sub-No. 2337 TA) dated March 1, 1971, REA applied for authority "to operate motor vehicles transporting commodities generally moving in express service between all points in the United States over non-radial irregular routes."

shippers and REA depends on replacing the Hub and other bits and pieces of motor operating authority it holds with the authority sought herein. Rather than imposing a burden on the Commission, REA's present application will avoid the necessity of a hearing on the Hub application -- which events have shown cannot do the job -- as well as the numerous pending atomized bits and pieces of regular route authority. For REA will dismiss the Hub proceeding and all other pending applications for motor operating authority upon final approval of the grant of the authority sought.

The Rexco Division of REA[4/] was established in the Spring of 1975, and commenced operations in August of 1975. REA which had been operating since February, 1975, as a Debtor-in-Possession under Chapter XI of the Bankruptcy Act, was by Order of the Court entered November 6, 1975, adjudicated a bankrupt and ordered liquidated. Thereafter, on November 7, 1975, REA filed "Embargo Notice No. 1" placing an embargo against all traffic tendered to REA Express, Inc. after 12:01, Friday, November 7, 1975. By virtue of a tariff issued June 10, 1975, effective June 15, 1975, I.C.C. 153, Commodity Tariff 85, the Rexco Division of REA remained in operation as a result of an amendment to Embargo Notice No. 1 issued November 10, 1975. All other REA operations, except those of the Rexco Division, ceased operation in November, 1975, and since that time all assets have been liquidated except for REA's operating authority. By agreement dated July 27, 1976, and approved by the Bankruptcy Court for the Southern District of New York, by Order dated July 27, 1976, Intervenor contracted with the Trustee, subject to approval of this Commission, to purchase and operate the certificates and temporary authorities of REA.

At the hearing, several former and one current Rexco agents described Rexco's method of operation. Although the general manager of the Rexco Division was present throughout much of the hearing, he did not testify. Also, the Trustee in Bankruptcy was not called to offer any testimony or explanation regarding the Rexco operation or his position regarding other matters.

Rexco's principal employee is its general manager. He operates from the Philadlephia area with a small staff that is principally engaged in billing shipments and paying agents and owner-operators. His principal functions have been in solicitation of traffic and in arranging for agents to solicit traffic and to obtain owner-operators to perform actual pickup, transportation, and delivery. No equipment is owned and none is operated under long term lease. No drivers, mechanics, safety men, tariff experts or supervisors are employed. The agents are located at numerous places across the country.

4/REXCO, Inc., named in the lead complaint, was determined to be a separate entity not involved in the matters under consideration herein and by stipulation, it was agreed that it should be removed as a party defendant.

The agents were generally instructed that they would solicit and handle traffic originating or terminating basically anywhere east of a line drawn generally north-south through the Rocky Mountain Region of the country in the vicinity of Denver and Albuquerque, plus certain locations west thereof. The agents were paid 7 percent of the revenues. Seventy-five percent of the revenues went to the supplier of the equipment and the driver. No other significant instructions were given regarding REA's actual authority except that Philadelphia could be called if there were problems. Agents were told not to solicit less than truckload traffic and the traffic actually handled was basically truckload or, at least, utilized the entire capacity of the vehicle.

The Rexco tariff basically reflects a scale of rates with at least a minimum 16,000 pound weight and the charge in most instances was within a few dollars of what the charge would be for a 40,000 pound shipment. The tariff specifically embargoed a wide range of commodities including live animals, perishable products, bullion, coin and other items of unusual value formerly handled by REA. The cost of transportation to a shipper (especially on moves of over 300 miles, which the agents were to emphasize), would usually be significantly less under REA's Rexco tariff than comparable moves by irregular route and regular route motor common carriers such as complainants. Agents used this rate difference as a primary solicitation tool.

Since the institution of the Rexco operations, several of the complainant motor common carriers have experienced specific diversion of truckload traffic to Rexco. These shipments have been of truckload amounts and such commodities as auto parts, iron and steel articles, building materials, aluminum, chemicals, and paper. A comparison of the Rexco rates and those of one of the complainants shows that on a 40,000 pound shipment of auto parts from Detroit, Mich., to Chicago, Ill., the shipper would pay complainant $412 and Rexco $220. An owner-operator's share would approximate $1.16 a mile in the first instance and $.62 a mile under a trip lease with Rexco. A detailed examination of Rexco's records by the Bureau of Operations of this Commission showed among other things, that during the period March 1 through 15, 1976, Rexco transported 674 truckload shipments between various points in the United States. Rexco's records reflect that between August, 1975, and June, 1976, it handled approximately 6,000 truckload shipments.

Drivers and equipment generally were obtained at nearby truck stops and trip leases usually were arranged so that an owner-operator could avoid a possible empty back haul, although on some occasions round-trip, back-to-back trip leases were arranged. Some agents had difficulty meeting requests for service because some drivers did not want to trip lease to REXCO as they felt that their overall payment was low or they had had difficulty securing timely payment from Rexco in the past.

The service performed for shippers was direct from consignor to consignee (on rare occasions stop-off privileges were utilized). Ordinary van equipment was often used, however, flatbed units were frequently used for transporting a significant proportion of Rexco's traffic (especially iron and steel articles and heavy machinery). Because of lack of adequate equipment features such as tie downs on ordinary vans, it appears that items such as steel coils and heavy machinery could not have been transported safely in ordinary van equipment.

Rexco has no central dispatch system and once a driver left the origin point he basically was out of Rexco's control. Generally he would call Rexco in Philadelphia only if he wanted to in case of trouble. Inspections of vehicles generally was made by the agents or their associates. Rexco's home office control was exercised only by insistence on completed paperwork being turned in before payment would be made. No check was made as to the accuracy of some paperwork item such as drivers' logs and inspection forms. On occasion, Rexco's records show that proper inspection of vehicles was not made and drivers violated the hours of service regulations of the Department of Transportation.

Except for checking with Philadelphia on accepting shipments to move west of Denver, no attempt was made by agents to find out if the origin and destination points could be served or what routing instructions should be given. Basically, instructions on shipping documents were generalized as "Rexco Direct" or other similar wording. Drivers were not instructed to travel specific routes or to go through specific points and it appears they generally went over the nearest direct highways in the Interstate system or over routes of their own choosing. These routes sometimes went to the driver's home town where the drivers went off duty for hours or days even though delivery could safely have been made within a much more expeditious time frame. A number of Rexco movements crossed Pennsylvania, apparently on Interstate Highway 80, a route not authorized in REA's authority. Other examples of traversal of routes not authorized to REA were shown to have occurred in Texas and Oregon. Also, points were served that are not listed in REA's terminal area publication or Waybill Guide (upon which its tariffs depend), including Fenwick, W. Va., Stephens City, Va., Elverson and Trumbauersville, Pa., Huguenot, N. Y., New London, Tex., and Huntington, Utah.

Except for a few instances where back-to-back trip leases reflected several movements on a regular basis, shipments were handled when a request for service was made and when an owner-operator became available. A delivery commitment was not made.

Rexco has not attempted to comply with the Commission's leasing regulations based upon its contention that section 1057.3 of the applicable regulations (49 CFR 1057.3(b)) provides they shall not apply "to equipment utilized wholly or in part in the transportation of railway express traffic, . . ."

It also appears that those in charge of the Rexco operation have little knowledge of REA's underlying tariff and related publications other than the basic Commodity Tariff 85 which became effective June 15, 1975 and Rexco has not attempted to conform with various provisions relating to requirements that it not provide free pickup and delivery beyond certain limits, that no partial unloading is permitted where charges are collect, and that it issue a Uniform Express Receipt or Uniform Express Bill of Lading.

DISCUSSION AND CONCLUSIONS

For approximately a year now, there has been no traditional small package express service by REA Express, Inc. REA is gone except for (1) operations conducted by the so-called Rexco Division under REA's authority and (2) REA's one unliquidated asset, its certificated operating authority. A decision on the issues described in these proceedings cannot require a trying of any issues

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that relate to the apparent proposal of Alltrans Express U.S.A., Inc., to attempt to provide a "full spectrum, nationwide express service" based upon the operating rights that it plans to purchase. Accordingly, our discussion and conclusions herein will be confined to the direct issues covered below, namely: (1) are the operations conducted by REA's Rexco Division a valid exercise of REA's authority which is basically limited to movements in "express service"? (2) should the unprosecuted application of a bankrupt and liquidated carrier, on file for 8 years, be dismissed? and (3) should the temporary authority held by a bankrupt and liquidated carrier be revoked?

I

Turning first to the complaint proceedings, we conclude that the Rexco Division operations cannot be found to be consistent with the basic limitation applicable to most of REA's authority that such movements be "in express service."

Although we have said that "express service" is not susceptible of precise definition, we repeatedly have set forth guidelines that have established the basic indicia of that term. Here, we need not consider whether an operating express company, holding authority limited by these terms, could never stray outside the general definition set forth in the ETA, Nashua, and Arrowhead cases, supra. We do not deny that there could be situations (such as the handling of consolidated truckloads), where a service would not meet one of the general criteria of express service but would at least satisfy several of these requirements. Also, we need not consider if an operating express company, whose overall transportation activities predominantly satisfy the definitions of express service, can conduct operations not within the strict concept of express service but nevertheless incidental to express service. Compare the decision in Chemicals in Aggregate Shipments, supra. Here, since at least November of 1975, the Rexco operation has been conducted in such a manner that it completely lacks even a minimal attempt to conform with the well established indicia of express service. The operation conducted by Rexco bears no relationship to REA's traditional small parcel service other than the incidental use of the phrase "a Division of REA Express, Inc.," and the sanction of the Trustee in Bankruptcy to use REA's operating rights in exchange for certain revenues.

In effect, the Trustee has allowed the establishment and perpetuation of an REA franchise system that amounts to nothing more than an unauthorized leasing of operating rights to various commission agents who desire to use the REA name, authority, and tariff. The Rexco Division itself is nothing more than an agent and sales solicitation service with an attendant billing service.

Rexco's general manager does not direct, control, or bear responsibility for REA's operations. As noted, the defendant herein failed to call this general manager as a witness, the one person who would appear to be most knowledgeable about the Rexco activities. Thus, there is nothing on this record to indicate that there is anyone capable of knowledgeable and responsible management of the purported motor carrier operations under REA's authority. To the contrary, the investigation of the complainants and the Bureau and the testimony of past and present Rexco agents, show the following: no one in the management of Rexco is familiar with the overall scope or limitation

of REA's operating authority; no attempt is made to see that service is performed to and from authorized points (with the exception of some points west of Denver); no attempt is made to see that drivers traverse authorized regular routes or to instruct them to use such routes; no responsibility is taken for control of drivers or shipments after pickup; no attempt is made to insure the expeditious movement of any shipment; no attempt, other than completion of paperwork, is made to insure the required inspection of trip-lease vehicles, the proper filling out of drivers' logs, or the attendant proper observation of the Department of Transportation hours of service limitations; no attempt is made to insure that only commodities covered by its tariffs are transported; no attempt is made to transport less-than-truckload or small package shipments; no attempt is made to use only ordinary van equipment; no attempt is made to see that proper express receipts or other tariff requirements are followed; and no attempt is made to be knowledgeable of leasing or other regulations that would tend to be applicable to its method of operation.

The record does show that the Rexco operations are not performed pursuant to any established schedule (a few movements have occurred on a regular basis); the operations are not conducted over regular routes; they do not move through or between terminals; they do not move at premium rates; they do not move in an expeditious manner; they often do not move in ordinary van equipment; they exclude the transportation of small parcels and less-than-truckload volume; they exclude the transportation of unusual type commodities; and they do not handle shipments requiring special care. In short, the record shows that Rexco operates, in effect, simply as a broker of irregular-route transportation of truckload quantities and, under these circumstances, no conclusion can be sustained other than that Rexco's operations are and have been beyond the scope of REA's underlying authority. The assertation by intervenor Alltrans and the defendant to the effect that REA's past operations have been those of a "full-spectrum" carrier amounts to little more than "sloganism" and is, to put it politely, inconsistent with the factual history of REA's operations. Although we recognize the duties of a trustee to preserve the asset of a bankrupt entity, it must be made perfectly clear that that duty does not grant a license to circumvent the regulatory requirements of this Commission. Here, the Trustee has chosen to pursue an extreme approach assertedly to preserve the "authority" asset of the bankrupt and, moreover, has actually attempted to expand upon that authority, without approval from this Commission (and without due process in respect to existing motor carriers), by moving the company into a substantially different area of transportation than that which it holds authority for. In his disregard of the limitations of REA's authority, he may have jeopardized, rather than preserved, that asset. Here, we must conclude that the past Rexco Division operations have been in the nature of willful violations that cannot be considered to be of the type that could be evaluated as "good faith" operations, "under color of right" and thus given affirmative weight in the future purchase proceeding or any related matter.

The Rexco operations have been totally illegal and all of its transportation services in non-express movements through the use of commission agents and trip-leased equipment must end immediately. Accordingly, an appropriate cease and desist order will be entered.

II

The application in the so-called "Hub System" proceeding must be dismissed. It has been on our docket for 8 years and since the pre-hearing conference held on January 12, 1970, no further action has been requested by the applicant despite an initial assertion at prehearing that it would be ready to present its operating evidence in April of 1970. Rule 247(b) of our General Rules of Practice requires that an applicant who does not intend timely to prosecute its application shall promptly request dismissal thereof. This, we believe, places some affirmative duty on an applicant to prosecute or seek dismissal. Applicant has done neither. It apparently did not seek dismissal because to do so would require the termination of its corresponding temporary authority in Sub-No. 2308 TA. It attempted to make a go of the "Hub System" approach between June, 1968, and mid 1971, but, in effect, it repudiated that approach, and specifically expressed its intention to dismiss the Hub proceeding, if it could be granted temporary authority to try another approach (See the ETA decision, supra, and the pleading in the Sub-No. 2337 TA noted above). Authority to try other approaches was denied. REA tried to survive while attempting to operate under the "Hub System", but did not succeed.

Clearly, REA would have failed much sooner had it not been for the forbearance of this Commission (and the motor carrier parties to the application proceeding), in giving REA every possible leeway and not forcing it to go immediately to hearing on matters it was not in a position to prove.

The Commission must not passively burden the administrative process by failing to recognize factors concerning the probability that a bankrupt and liquidated carrier will not and cannot prosecute its outstanding applications. There is no rationale for failing to dismiss pending applications under such circumstances, unless there is some positive showing that can persuade us otherwise. This is especially true where the concept of the application involves unique factors and considerations and where it is shown that the proposed operation is, in all probability, not feasible and there is little probability that the application would or could be successfully prosecuted.

We conclude that no reasons are shown to exist at this point in time to allow the continued pendency of the unprosecuted REA "Hub System" permanent application, that dismissal of this application will not be inconsistent with the public interest, the public convenience and necessity, or the National Transportation Policy and, accordingly, we will order dismissal of that application.

III

The temporary authority currently outstanding in Sub-No. 2308 TA must be revoked inasmuch as the continuation of temporary authority is conditioned upon the pendency of a corresponding permanent authority application (49 CFR 1101), and, we have concluded herein to dismiss that corresponding application.

Moreover, even if the corresponding "Hub" application were not dismissed, ample cause otherwise exists for the prompt revocation of the Sub-No. 2308 TA temporary authority. We may revoke temporary authority at any time under the provisions of Section 210a(a) of the Interstate Commerce Act and 49 CFR 1101.4 which states that:

> "nothing in this part shall be construed as preventing the Commission from terminating at any time, in accordance with law, any temporary authority or approval, or any extension thereof under section 558 of the Administrative Procedure Act (5 U.S.C. 558)".

Accordingly, if the Commission finds good cause, it may revoke an outstanding temporary authority as long as its decision to do so is not arbitrary, capricious, outside of Commission discretion, or otherwise not in accordance with established principles. Here, the parties have had ample opportunity to make their views known to the Commission and, in consideration of these views and the record before us, we conclude that such good cause exists in this proceeding for the following reasons.

First, we observe that the fitness and ability of a carrier to conduct operations under temporary authority always is a matter of special concern. We believe the record herein shows that REA has absolutely no operational capability to perform any express service under the scope of the involved "Hub System" temporary authority. Moreover, the performance, under the apparent approval and direction of the Trustee in bankruptcy of the improper operations discussed above, shows that REA, as it now exists, is not fit to conduct proper and safe operations. Next, we again note that the feasibility of any proper operations under the "Hub System" have been shown to be impractical. Finally, we conclude that the use of the "Hub System" authority by the Rexco Division has caused a significant diversion of traffic (approximately 6,000 shipments up to May, 1976), and revenue from the Nation's regulated motor carrier industry (traffic that has had nothing to do with REA's traditional small parcel express service), and that to continue to allow such diversions would be inconsistent with the Commission's duty to promote and foster sound economic conditions in transportation under the National Transportation Policy.

Under these circumstances, we find no saving reason to perpetuate the "Hub System" temporary authority and we find it necessary and proper at this time to revoke this authority. And, for the reasons noted above, we will undertake a review of all other outstanding temporary authorities granted to REA but not directly before us in these proceedings with a view toward their necessary revocation.

The defendant REA and intervenor Alltrans make it clear that, pursuant to a contract between them, Alltrans would seek to revitalize operations which REA voluntarily shutdown well over a year ago. Certain of these operations have not been performed for a number of years. We take particular note of the fact that the shipping public has been without this service by REA and that other carriers have expanded to fill the void created as REA's service eroded over the

years. It is in that light that we look upon the contention of REA and Alltrans that dismissal of REA's pending applications for permanent authority and cancellation of its corresponding applications for temporary authority would amount to a severe detriment to the shipping public supposedly by depriving it of a nationwide express service to be provided by Alltrans. It was an unfortunate circumstance that an important provider of parcel service has had a strike in a number of eastern States at a time when the transportation system normally is called upon to handle an extraordinary amount of holiday-season shipments. Nevertheless, whatever immediate need arose out of that strike cannot be a major consideration in determining the long-range issues in these proceedings or in the Alltrans' proposal to embark upon a new nationwide general express service. There is available within the law today -- through Section 210a(a) of the Act -- a means by which any immediate and urgent need for transportation service can be satisfied by willing carriers. Further if there is, in fact, a need for a nationwide general express service to handle, by motor carrier, general commodities over regular routes, and such a service can be distinguished from that now being provided by regular-route carriers of general commodities, the law provides a way through Sections 210a(a) and 207 (and certain other provisions) of the Act by which carriers may seek appropriate authority. The present statutory plan provides the means by which such a service can be instituted on an emergency basis if an urgent need can be shown.

IV

Under all these circumstances, it is concluded that the complainants have satisfied their initial burden to establish a prima facie case, that the defendant has been afforded appropriate due process, and that complainants have carried their ultimate burden of persuasion. Compare Natl. M. Fit. Traffic Assn. v. Columbia Shippers, 105 M.C.C. 846 at 850.

Lastly, it is also concluded that no significant factors are shown on this record to indicate that either a grant or a denial of the relief sought herein would have any significant effect upon the quality of the human environment or upon the consumption of energy resources.

FINDINGS

In Nos. MC-C-8862, MC-C-8864, MC-C-8867, and MC-C-8874, we find that defendant REA Express, Inc., bankrupt, through C. Orvis Sowerwine, Trustee in Bankruptcy, of New York, N. Y., is and has been engaged in the performance of motor common carrier service which fall outside the definition of express service and in services otherwise beyond the scope of its specifically limited authorities as detailed above; and that an order should be entered requiring defendant to cease and desist forthwith and thereafter to refrain and abstain from all operations of the character found in this report to be unlawful, unless and until appropriate authority therefor is obtained.

In No. MC-66562 (Sub-No. 2345)(Part No. 181), we find that applicant REA Express, Inc., has failed to prosecute its application in a timely manner; that applicant is not shown to be capable of prosecuting the application; that attempted prosecution of the application would not appear likely to result in a feasible operation

consistent with the public interest and the national transportation policy or required by the public convenience and necessity such that any appropriate authority would be issued as a result of such prosecution; and that an order should be entered dismissing the application.

In No. MC-66562 (Sub-No. 2308 TA), we find that good cause has been shown for the termination of the involved temporary authority, and that an order should be entered revoking said authority.

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

An appropriate order will be entered.

COMMISSIONER O'NEAL concurred in the result.

COMMISSIONER CORBER did not participate.

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ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 17th day of November, 1976.

No. MC-C-8862

BRADA MILLER FREIGHT SYSTEM, INC. v. REXCO, INC. AND REA EXPRESS, INC.

No. MC-C-8864

SCHNEIDER TRANSPORT, INC. v. REA EXPRESS, INC.

No. MC-C-8867

AMERICAN TRUCKING ASSOCIATIONS, INC. v. REA EXPRESS, INC.

No. MC-C-8874

ASSOCIATED TRUCK LINES, INC., ET AL. v. REA EXPRESS, INC.

No. MC-66562 (Sub-No. 2345)(Part No. 181)

REA EXPRESS, INC. - PETITION OF AMERICAN TRUCKING ASSOCIATIONS, INC., FOR DISMISSAL OF APPLICATION

No. MC-66562 (Sub-No. 2308 TA)

REA EXPRESS, INC. - PETITION OF AMERICAN TRUCKING ASSOCIATIONS, INC., FOR CANCELLATION OF TEMPORARY AUTHORITY

Investigation of the matters and things involved in these proceedings, having been made and the Commission on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is made a part hereof:

It is ordered, That in proceedings Nos. MC-C-8862, MC-C-8864, MC-C-8867, and MC-C-8874, defendant REA Express, Inc., Bankrupt, C. Orvis Sowerwine, Trustee in Bankruptcy, be, and it is hereby notified and required to cease and desist forthwith, and thereafter to refrain and abstain from all operations of the character found in this report to be unlawful and in violation of the Interstate Commerce Act, unless and until appropriate authority therefor is obtained, and said defendant is further required to comply with the provisions of Rule 99 of the Commission's General Rules of Practice (49 CFR 1100.99).

It is further ordered, That in proceeding No. MC-66562 (Sub-No. 2345)(Part No. 181), the proceeding be, and it is hereby, dismissed.

It is further ordered, That in proceeding No. MC-66562 (Sub-No. 2308 TA), the temporary authority granted by the order of June 3, 1968, as extended, be and it is hereby revoked.

It is further ordered, That all motions filed herein be, and they are hereby, denied.

And it is further ordered, That the statutory effective and compliance date of this order shall be 30 days after the date of service hereof.

By the Commission.

ROBERT L. OSWALD,
Secretary

(SEAL)